TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 133.

BOQUILLAS LAND AND CATTLE COMPANY, APPELLANT,

vs.

J. N. CURTIS, SAMUEL C. CURTIS, LYMAN CURTIS, AND JOHN SUMMERS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED JULY 15, 1907.

(20,796.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 21, 1908.

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a TRANSCRIPT ON APPEAL.

In the Supreme Court of the United States.

No. —.

BOQUILLAS LAND & CATTLE COMPANY, a Corporation, Plaintiff,
v.
THE ST. DAVID CO-OPERATIVE COMMERCIAL & DEVELOPMENT ASSOCIATION, a Corporation; THE ST. DAVID CANAL COMPANY, a Corporation; JOHN MERRILL, J. N. CURTIS, SAMUEL CURTIS, JOHN SUMMERS, JOHN DOE, and RICHARD ROE, Whose Names are Unknown, Defendants.

1 *Complaint.*

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

BOQUILLAS LAND AND CATTLE COMPANY (a Corporation), Plaintiff,
v.
THE ST. DAVID CO-OPERATIVE COMMERCIAL AND DEVELOPMENT ASSOCIATION (a Corporation), THE ST. DAVID CANAL COMPANY (a Corporation), JOHN MERRILL, J. N. CURTIS, SAMUEL CURTIS, JNO. SUMMERS, JOHN DOE, and RICHARD ROE, Whose True Names are Unknown, Defendants.

Now comes the plaintiff and for cause of action against the defendant alleges and avers:

I.

That the plaintiff is a corporation organized and existing under the laws of the State of California, with its principal place of business at the city of San Francisco in the State of California.

That the plaintiff has filed a certified and duly authenticated copy of its articles of incorporation in the office of the Auditor of the Territory of Arizona, and of the Recorder of the County of Cochise, and has published six times in a newspaper published in the county of Cochise a copy of its said articles of incorporation, and has filed in the office of the said Auditor an affidavit stating that said publication was made according to law, and that the plaintiff has duly, and in accordance with law appointed a resident agent
2 in the said county of Cochise who was for more than three years prior to his said appointment and is now an actual and *bona fide* resident of the said county. That all of the same was done in accordance with the statute of the Territory of Arizona. That the defendants, the St. David Co-operative Commercial and Development Association and the St. David Canal Company are corporations organized and existing under the laws of the Territory of Arizona.

II.

That for more than seventy years last past the plaintiff and its predecessors in interest have been the owners and entitled to the possession of that certain tract of land situated in the county of Cochise, Territory of Arizona, known as "The Rancho San Juan de Las Boquillas y Nogales."

That the said tract of land is described as follows:

That certain tract of land known as the Rancho San Juan de las Boquillas y Nogales," the same being a strip of land two and one-fourth (2¼) miles in width lying along, and extending to a distance of one and one-eighth (1⅛) miles on each side of the San Pedro River, said strip beginning at a point on said River about seven (7) miles above (south of) the town of Fairbanks in said county of Cochise, and extending thence down, along and on each side of said River as aforesaid, for a distance of about fourteen and one-half (14½) miles to a point on said River about seven and one-half (7½) miles below (north of) said town of Fairbanks; said Rancho being the same tract of land described in U. S. Patent No. 4446, recorded in the office of the county recorder of the county of Cochise, Territory of Arizona, in Book 14 of Deeds, at pages 280 to 299, inclusive, Records of said County of Cochise.

3 III.

That the said lands and premises with all the hereditaments and appurtenances thereunto belonging were on or about the 8" day of May 1833, duly granted by the State of Sonora, Republic of Mexico to the predecessor in interest of the plaintiff.

That on or about the 14" day of February, 1899, the said grant was confirmed by judgment of the court of land claims, established in pursuance of an act of Congress of the United States and that on the 14" day of December, 1900, in pursuance of said judgment, a patent for the said lands was issued by the United States government to the predecessors in interest of the plaintiff; and that the plaintiff is the owner and entitled to the exclusive possession of all of the said premises, and each and every part thereof, and of all the hereditaments and appurtenances thereunto belonging.

IV.

That the said San Pedro River is a natural stream of water which rises in the mountains in the state of Sonora near the boundary line between the Republic of Mexico and the said county of Cochise, and flows from said mountains down to the said county of Cochise and into and through the said county to a point in the county of Pinal where it flows into the Gila River, and thence through the Colorado River to the Gulf of California, and the Pacific Ocean. That the above described lands and premises are riparian of the said river and such river in such course naturally flows through the said lands of said plaintiff and thereby waters and sub-irrigates and renders the same much more fertile, productive and valuable.

4

V.

That said lands and premises of the plaintiff consist in great part of damp pasture grazing and arable bottom land, rising gently from the said San Pedro River, and that a large portion thereof is irrigable from the waters of said river as they flow through the said lands.

VI.

That the title of the plaintiff and its predecessors in interest to the said lands and premises has been long in dispute, and that the right of the predecessors in interest of the plaintiff to the exclusive ownership and possession of the said premises was not ascertained and determined until the year 1900 when the aforesaid patent was issued by the government of the United States; and that the title to part of the said lands and premises is still wrongfully disputed by persons who have been in possession of parts thereof, and who refuse to remove therefrom and to recognize the said patent.

That by reason of the said litigation and dispute the predecessors in interest of the plaintiff, and the plaintiff have not heretofore made actual and physical use of all of the waters of the said river; but that the waters of the said river are, and will always continue to be necessary for the irrigation of the said lands and premises, and that the flow of water in the said river is not sufficient to irrigate all of the said lands and premises belonging to the plaintiff as aforesaid which are susceptible of irrigation and that if any of the said water be diverted from the natural course of the said river and conducted to other lands and premises, the said lands belonging to the plaintiff will be without sufficient water for the irrigation
5 thereof, but will become valueless, and that the plaintiff will be irreparably injured by such diversion of any of said water.

VII.

That in or about the month of December, 1904, the defendants or certain persons acting as their agents or employees, and without the consent of the plaintiff, entered upon the lands and premises belonging to the plaintiff as aforesaid at a certain point about one and one half miles below and north of the town of Fairbanks and about twenty yards below and north of a point on said river where a certain dam had existed for the purpose of diverting water upon the said lands and premises of plaintiff, and commenced to construct a dam and canal or ditch in the said river for the purpose of diverting waters therefrom. That the said persons threaten and intend, as plaintiff is informed and believes, to enter wrongfully and without right or authority and against the protest of the plaintiff upon the said lands of the plaintiff and build a ditch thereover and build a dam and head gate at a point in the said river at or near said last mentioned point, and divert the waters of the said river outside of the lands of the plaintiff through said ditch running over the lands of the plaintiff which they threaten and intend to build as aforesaid, to and through other lands not belonging to the plaintiff to certain lands owned by the said defendants or some of them, below

the said lands of the plaintiff, for the purpose of irrigating the said lands below the lands of the plaintiff with such waters; and that the said waters if diverted as threatened by defendants, will naturally drain back into the said river at a point in the channel thereof below the boundary line of the plaintiff's land.

6 VIII.

That the said threats to divert said water are open, notorious and to the effect that such diversion will be continuous and uninterrupted under claim of right and adverse to the whole world except the defendants and those acting in coöperation with them; and that the defendants unless restrained by this court will enter upon said lands of plaintiff and will build such ditch and dam and head gate thereon, and will cause such diversion to be made and will continue the same and prevent the said waters from flowing down to, along or over the said land of the plaintiff where they naturally and of right ought to flow, and that the defendants will thereby acquire an easement over the plaintiff's lands and the right as against the plaintiff to continue the said diversion and will cause great and irreparable injury to the plaintiff.

Wherefore, plaintiff prays judgment,

First. That the defendants and each of them and their agents, employees and servants be perpetually enjoined from entering upon the lands of the plaintiff or any part thereof, and from building any ditch, dam or head gate at any point within the boundaries of the said land of the plaintiff, and from diverting by means of a ditch, dam or head gate, or by any other means, any of the waters of the said San Pedro River from any point upon the said river upon the lands of the plaintiff or above the same; and from so preventing any portion of the water of the said San Pedro River from flowing down to, through and over said land of plaintiff where they naturally and of right ought to flow; and

Second. For such other and further relief as to the court seems meet in the premises, and for costs of suit.

EUGENE S. IVES,
P'ff's Att'y, Tucson, Arizona.

7 TERRITORY OF ARIZONA, *County of Pima, ss:*

H. K. Street, being duly sworn, deposes and says; that he is the superintendent of the plaintiff in the above entitled action; that he has read the foregoing complaint, knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

H. K. STREET.

Subscribed and sworn to before me this 9" day of February, 1905.

My commission expires May 29, 1907.

[SEAL.] JOSIE B. HENDERSON,
Notary Public.

(Endorsed:) No. 3723. District Ct. Cochise County. Boquillas Land & Cattle Company, Plaintiff *vs.* The St. David Co-operative Commercial & Devel. Ass'n, and others, Defendants. Complaint. Eugene S. Ives, Pl'ff's Att'y, Tucson, Arizona. Filed Feb. 14, 1905. Geo. B. Wilcox, Clerk District Court, by Philo Wilcox, Deputy.

8 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

BOQUILLAS LAND AND CATTLE COMPANY (a Corporation), Plaintiff,

vs.

THE ST. DAVID CO-OPERATIVE COMMERCIAL AND DEVELOPMENT ASSOCIATION (a Corporation), THE ST. DAVID CANAL COMPANY (a Corporation), JOHN MERRILL, J. N. CURTIS, SAMUEL CURTIS, JNO. SUMMERS, JOHN DOE, and RICHARD ROE, Whose true Names are Unknown, Defendants.

Action Brought in the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise, and the Complaint Filed in the said County of Cochise, in the Office of the Clerk of said District Court.

The Territory of Arizona sends Greeting to the St. David Co-operative Commercial and Development Association (a corporation), The St. David Canal Company (a corporation), John Merrill, J. N. Curtis, Samuel Curtis, Jno. Summers, John Doe, and Richard Roe, whose true names are unknown:

You are hereby required to appear in an action brought against you by the above named plaintiff in the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise and to answer the complaint filed therein within twenty days (exclusive of the day of service), after the service on you of this summons (if served within the county; otherwise within thirty days), or judgment by default will be taken against you according to the prayer of said complaint.

9 Given under my hand and the seal of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, this 14" day of February in the year of our Lord one thousand nine hundred and five.

[COURT SEAL.]

GEO. B. WILCOX, *Clerk*,
By PHILO WILCOX,
Deputy Clerk.

(Endorsed:) Service of within accepted for The St. David Co-operative Commercial & Development Association & The St. David Canal Co. this Feb'y 14, 1905. Ben Goodrich, their Att'y. Original. No. 3723. In the District Court Second Judicial District, County of Cochise, Territory of Arizona. Boquillas Land & Cattle Company (a corporation), Plaintiff *vs.* The St. David Co-operative Company & Dev. Association, *et al.*, Defendants. Summons. Eugene S. Ives, Plaintiff's Attorney. Filed February 14th, 1905. Geo. B. Wilcox, Clerk, E. A. Barr, Deputy.

10 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

BOQUILLAS LAND AND CATTLE COMPANY (a Corporation), Plaintiff,

v.

THE ST. DAVID CO-OPERATIVE COMMERCIAL AND DEVELOPMENT ASSOCIATION (a Corporation), THE ST. DAVID CANAL COMPANY (a Corporation), JOHN MERRILL, J. N. CURTIS, SAMUEL CURTIS, JNO. SUMMERS, JOHN DOE, and RICHARD ROE, Whose true Names are Unknown, Defendants.

Affidavit.

TERRITORY OF ARIZONA, *County of Pima, ss:*

H. K. Street being duly sworn, deposes and says: that he is the superintendent of the plaintiff in the above entitled action, and that it is one of his duties as such superintendent to procure the institution and prosecution of the said cause. That the defendants or their agents or employees are now constructing a canal with a large force of men, and with great diligence and expedition nearing the boundary line of the lands and premises described in the complaint as belonging to the plaintiff; that said canal so constructed can under no circumstances be of any use whatever unless the same be connected with the San Pedro River at some point near the point mentioned in the complaint, to-wit, about 1½ miles from the town of Fairbank, and upon the land and premises of the plain-

11 tiff.

That deponent is informed and believes that the defendants intend as soon as they have completed the construction of those portions of the canal which are not upon the lands of the plaintiff to enter upon the lands of the plaintiff wrongfully and without right or license from the plaintiff, and with great rapidity connect the said portions of the said ditch with the said San Pedro River, and in making such connection to build a canal or ditch without right upon the lands of the plaintiff, and also to build a dam or head gate at or near the said point mentioned in the complaint in the said San Pedro River, all without the consent and against the rights of the plaintiff.

That deponent believes that said acts will be done and performed unless an injunction is issued restraining the defendants from entering upon the lands and premises and digging any canal or head gate thereupon.

That the case is too urgent to admit of the delay in giving notice, and that deponent verily believes that the said acts concerning which injunctive relief is sought by the plaintiff, will be committed by the defendants before a motion for injunction can be heard; and therefore deponent believes that the interests of the plaintiff require that a temporary injunction should be granted without notice; and that if said injunction is not granted without notice, by

reason of the foregoing facts the plaintiff will suffer irreparable damage and injury.

H. K. STREET.

12 Subscribed and sworn to before me this 9" day of February, 1905.

My commission expires May 29", 1907.

[SEAL.] JOSIE B. HENDERSON,
Notary Public.

(Endorsed:) No. 3723. District Ct., Cochise County. Boquillas Land & Cattle Co., Plaintiff, *vs.* The St. David Co-operative Commercial & Devel. Ass'n, and others, Defendants. Affidavit. Filed Feb. 14, 1905. Geo. B. Wilcox, Clerk District Court. By Philo Wilcox, Deputy.

13 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

BOQUILLAS LAND AND CATTLE COMPANY (a Corporation), Plaintiff,
v.
THE ST. DAVID CO-OPERATIVE COMMERCIAL AND DEVELOPMENT ASSOCIATION (a Corporation), THE ST. DAVID CANAL COMPANY (a Corporation), JOHN MERRILL, J. N. CURTIS, SAMUEL CURTIS, JNO. SUMMERS, JOHN DOE, and RICHARD ROE, Whose True Names Are Unknown, Defendants.

Order.

To The St. David Co-operative Commercial and Development Association (a corporation), The St. David Canal Company (a corporation), John Merrill, J. N. Curtis, Samuel Curtis, Jno. Summers, John Doe, and Richard Roe, whose true names are unknown, defendants:

You are hereby notified that an application for writ of injunction has this day been made to me in Chambers, and it appearing that delay will not prove injurious to either party and that justice may be subserved thereby, you are hereby notified of such application, and that I have fixed the 25" day of February, 1905, as the time, and the court house in the town of Florence in Pinal County, Arizona, as the place for hearing and determining this application.

You are therefore notified to that effect, and you are further hereby Ordered and directed that pending the hearing on that day you will refrain from doing any of the acts the doing whereof
14 you are asked in the said complaint to be restrained from, and that you will not enter upon the land described in the complaint or engage in the construction of the ditch or canal, head gate or dam, the building and construction of which you are asked in said complaint to be enjoined from. Done at Chambers in Casa Grande and within the Second Judicial District this 11" day of February, 1905.

FLETCHER M. DOAN, *Judge.*

(Endorsed:) Service accepted for the St. David Co-operative Commercial & Development Association & The St. David Canal Company by receipt of copy of within this Feb'y 14, 1905. Ben Goodrich, their Att'y. No. 3723. In the District Court of the Second Judicial District, County of Cochise. Boquillas Land & Cattle Company, Plaintiff, *vs.* The St. David Co-operative Com. & Dev. Association *et al.*, Defendants. Restraining Order. Filed Feb. 17th, 1905. Geo. B. Wilcox, Clerk District Court; By E. A. Barr, Deputy.

15 In the District Court of the Second Judicial District of the Territory of Arizona in and for Cochise County.

BOQUILLAS LAND AND CATTLE COMPANY, a Corporation, Plaintiff,

v.

THE ST. DAVID CO-OPERATIVE COMMERCIAL AND DEVELOPMENT ASSOCIATION, a Corporation; THE ST. DAVID CANAL COMPANY, a Corporation; JOHN MERRILL, J. N. CURTIS, SAMUEL CURTIS, JOHN SUMMERS, JOHN DOE, and RICHARD ROE, Whose True Names Are Unknown, Defendants.

Answer.

Now comes the defendants above named and answering the complaint of the plaintiff, allege and say:

1st. That they have no information and belief on the subject sufficient to answer it in that behalf, and placing their denial on the ground of lack of information, deny that the plaintiff or its predecessors in interest have been the owner or entitled to the possession of the land and premises described in Paragraph 2 of plaintiff's complaint for the last seventy years, or for any period of time or at all.

2nd. Admit on information and belief that the lands and premises mentioned in plaintiff's complaint with the hereditaments and appurtenances thereunto belonging were, on or about May 8th, 1833, granted by the State of Sonora, Republic of Mexico, to Captain Ygnacio Elias Gonzales and Nepumoceno Felix, but these defendants deny for lack of any information or belief on the subject that
16 plaintiff is the successor in interest of said grantees.

3rd. Admit on information and belief that on or about February 14th, 1899, that said grant was confirmed by judgment of the court of private land claims, and that in pursuance of said judgment, a patent for the said lands was issued by the United States Government to said original grantees their successors and assigns.

4th. But denies for lack of information and belief on the subject that plaintiff is the successor in interest of said original grantees, and on the same ground denies that plaintiff is the owner or entitled to the exclusive or other possession of all or any of said premises or of the hereditaments or appurtenances thereunto belonging.

5th. These defendants deny that a great part of said land grant described in plaintiff's complaint consists of damp, pasture, grazing and arable bottom land; on the contrary it alleges that said grant contains over 17,000 acres of land, and that a very small fraction of

it is arable or is irrigable from the waters of said San Pedro river or is riparian to the same.

6th. Defendants deny that they or any other person or persons acting as their agents or employees, or with or without the consent of plaintiff entered upon said lands and premises at a point described in Paragraph 7 of plaintiff's complaint or elsewhere for the purpose of diverting the water upon said lands and premises of plaintiff or commenced to construct a canal or ditch in the said river for the purpose of diverting waters therefrom, or threaten or intend to
17 enter wrongfully or without right or authority upon the lands of plaintiff for any purpose whatever.

7th. On the contrary these defendants allege that in the year 1877 the predecessors and grantors in interest of Defendants erected a dam across the San Pedro river in Cochise County, Arizona, between the old town of Contention and Fairbank, and constructed a dam and ditch now known as the Union or Hill ditch, but then known as the Mason and Cable ditch, and appropriated the waters of the San Pedro river to the extent of said ditch, which was six feet wide at the bottom and three feet in depth. And that the defendants and their predecessors in interest have been, ever since the last mentioned date, in the peaceable, quiet, exclusive, adverse, continuous, open, notorious possession and use of said dam and ditch and all the waters that run therein, using and enjoying the same for domestic and agricultural purposes, every year until the present time. That the plaintiff and its predecessors or grantors have never diverted or appropriated, or attempted to divert or appropriate any of the water flowing in or running through said ditch, and has never used or attempted to use the same, either for domestic, agricultural, or any other purpose.

8th. That thereafter and more than ten years before the commencement of this action, said ditch was enlarged, widened and deepened so as to take out all of the waters flowing in the San Pedro river at the head of said ditch where the head-gate was located and where it leaves said river during the dry season of the year, and that by means of said dam and ditch diverted and appropriated all of the waters of said river and conveyed the same by means thereof
18 and various lateral ditches from said main ditch onto the lands of the persons whose lands were contiguous or irrigated therefrom, the same being necessary for household, domestic and irrigation purposes.

9th. That the lands irrigated under said ditch consisted of about 4000 acres, and that said appropriation was made for the purpose of irrigating said lands, and for the domestic use of the occupants of the land watered by said ditches, and without such irrigation said lands are entirely worthless.

10th. That the parties whose lands are now and were at that time irrigated from said ditches are farmers and rely on the cultivation of their lands which lie along and contiguous to said ditch for the support of their families; that said persons own in the aggregate about 4000 acres of land which is irrigated under said ditch, and have long cultivated the same and are entitled to all of the waters flowing from

said San Pedro river through said ditch for their domestic and irrigation purposes.

11th. That defendants and the persons who get their water for irrigation and domestic purposes through said head-gate and ditch, have been in the peaceable, quiet, exclusive, adverse, continuous, open and notorious use of all the water that could flow through said ditch for more than ten years next before the commencement of plaintiff's action, and defendants here specially plead paragraph 2938 of Chapter 1 of Title 41 of the Revised Statutes of Arizona for 1901, in bar of the plaintiff's right to recover.

19 12th. And further answering, these defendants say that they and those living under said ditch and who procure their water for domestic and irrigation purposes therefrom, have been in the peaceable, quiet, adverse, open, exclusive, and notorious possession of said ditch and the use of the water flowing through the same for more than five years next before the commencement of plaintiff's action, and have paid all taxes assessed against the same for more than five years under deed or deeds duly recorded, and the defendants here specially plead paragraph 2937 of Chapter 1, Title 41, of the Revised Statutes of Arizona 1901, in bar of plaintiff's right to recover.

13th. And further answering, these defendants say, that they and those living under said ditch, and who procure their water for domestic and irrigation purposes therefrom, have been in the peaceable, quiet, adverse, open, exclusive, and notorious possession of said ditch and the use of the water flowing through the same, for more than three years next preceding the commencement of the plaintiff's action, and have paid all taxes assessed against the same for more than three years, under deed or deeds duly recorded, and defendants here specially plead paragraph 2935 of Chapter 1, Title 41, of the Revised Statutes of Arizona 1901, in bar of the plaintiff's right to recover.

14th. And further answering, these defendants say, that they and those living under said ditch, and who procure their water for domestic and irrigation purposes therefrom, have been in the

20 peaceable, quiet, adverse, open, exclusive, and notorious possession of the said ditch and the use of the water flowing through the same, for more than two years next preceding the commencement of plaintiff's action, and have paid all taxes assessed against the same for more than two years, under deed or deeds duly recorded, and the defendants here specially plead paragraph 2941 of Chapter 1, Title 41, of the Revised Statutes of Arizona 1901, in bar of the plaintiff's right to recover.

15th. These defendants allege that the ditch which plaintiff alleges that defendants are now about to and threaten to dig, is the same identical ditch that it and its predecessors constructed in 1877, and which they and their predecessors in interest have used continuously, openly, notoriously, peaceably and adversely against all the world since 1877 up to the present time.

16th. Defendants in this regard allege, that the only work, or only threat, or only attempt to do anything in or about said ditch or

dam, is simply to clean out the ditch so that the water would flow and to build a dam across the river to turn the water into said ditch by reason of the fact that the freshets during the last winter months have washed away the dam that was there before.

Wherefore, defendants pray that the restraining order heretofore granted in this case be dissolved, and that plaintiff recover nothing by this action, and that defendants go hence without day with their costs.

BEN GOODRICH,
PICKETT & BOWMAN,
Attorneys for Defendants.

21 TERRITORY OF ARIZONA,
County of Cochise, ss:

John S. Merrill being duly sworn, deposes and says: that he is one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true in substance and in fact, except as to those matters stated on information and belief, and as to said matters he believes it to be true.

JOHN S. MERRILL.

Subscribed and sworn to before me this 6th day of July, 1905.

[SEAL.] E. G. SHEPARD,
Notary Public in and for
Cochise County Arizona.

My commission expires Dec. 16th, 1906.

(Endorsed:) No. 3723. District Court, etc. Boquillas Land & Cattle Co. Pl'ff, *vs.* The St. David Co-operative Com. & Dev. Co. *et al.*, Def'ts. Answer. Filed July 7, 1905, Geo. B. Wilcox, Clerk District Court. By Philo Wilcox Deputy. Service admitted this 28th of June, 1905. E. S. Ives, Def'ts' Atty.

22 In the District Court of the Second Judicial District, Territory of Arizona in and for Cochise County.

No. 3723.

BOQUILLAS LAND & CATTLE CO., Plaintiff,
v.
ST. DAVID CO-OPERATIVE COM. & DEV. ASS'N, Defendant.

Jury List.

	Names of jurors.	Excused by Plaintiff. C per	Excused by Defendant. C per	Court.
1	Arthur Weeks	P		
2	Peter Bute	P		
3	B. A. Bennett	P		
4	John Henninger	P		
5	J. D. Walker	P		
6	Walter Doritz	P		
7	F. N. Wolcott	C ex.		
8	Wm. Featherman	C ex.		
9	Geo. McKinzie	P		
10	E. J. Castenada	P		
11	E. A. Fletcher	P		
12	A. Jones	P		
13	J. A. Covey	C ex.		
14	Robert Joyce	P		
15	Thos. R. York	P		
16	Henry Hall	P		
17	Ollie Simpson	P		
18	Tom Whitley	C ex.		
19	J. N. Christianson	C ex.		
20	Joseph McPherson	C ex.		
1	Rye Miles	P		
2	J. M. Edgar	P		
3	J. B. Miano	C ex.		
4	John Peck	C ex.		
5	Harry Eckman	C ex.		
6	Ben Heny	C ex.		
7	R. H. Sneed	C ex.		
8	J. M. Montano	C ex.		
9	Nelson Stevenson	P		
10	C. E. Buckner	C ex.		
11	Geo. P. Frysinger	P		
12	Bert Beade	P		
13	J. H. Beare	P		
14	John Raney	P		

23 In the District Court of the Second Judicial District, Territory of Arizona in and for Cochise County.

No. 3723.

BOQUILLAS LAND & CATTLE CO., Plaintiff,

v.

ST. DAVID CO-OPERATIVE COM. & DEV. ASS'N, Defendant.

Jury List.

	Names of jurors.	Excused by Plaintiff. C	per	Excused by Defendant. C	per	Court.
1	Arthur Weeks	...		...		1
2	Peter Bute	...		...		2
3	[B. A. Bennett]*	...		1		
4	[John Henninger]*	1				
5	J. D. Walker	...		...		3
6	Walter Doritz	...		...		4
7	Geo. McKinzie	...		...		5
8	[E. J. Castenada]*	...		2		
9	E. A. Fletcher	...		...		6
10	[A. Jones]*	2				
11	Robt Joyce	...		...		7
12	Thos. R. York	3				
13	[Henry Hall]*	...		3		
14	Ollie Simpson	...		...		8
15	[Rye Miles]*	...		4		
16	J. M. Edgar	...		...		9
17	Nelson Stevenson	...		...		10
18	[Geo. P. Frysinger]*					
18	[19]* Bert Beach	...		...		11
19	[20]* J. H. Beare	...		...		12
20	[21 John Rainey]*	4				

(Endorsed:) No. 3723. District Court, 2nd Judicial District, County of Cochise, Territory of Arizona. Boquillas Land & Cat. Co. Plaintiff, *vs.* St. David Co-operative Com. & Dev. Ass'n, Defendant. Jury List. Filed Nov. 3" 1905. Geo. B. Wilcox, Clerk.

[* Words and figures enclosed in brackets erased in copy.]

24 In the District Court of the Second Judicial District, Territory of Arizona in and for Cochise County.

BOQUILLAS LAND & CATTLE COMPANY, Plaintiff,
v.
ST. DAVID DEVELOPMENT & CANAL CO. ET AL., Defendants.

Memorandum of Costs and Disbursements.

Disbursements.

Sheriff's Fees. See Witness fees		$—
Clerk's Fees		
Witness Fees, George Dolfin		$11.70
" " Peter Haviland		5.55
" " Fenter		12.00
" " Reed		10.65
" " Larrien		12.00
" " Ashburn		4.65
" " Escalente		11.70
" " Montejo		11.70
" " Gray		7.80
" " Elias Summers		.80
Court Reporter's Fees		8.50

25 In the Second Court of the County of Cochise, Arizona.

THE BOQUILLAS LAND AND CATTLE CO., Plaintiff,
v.
ST. DAVID CO-OPERATIVE COM. & DEV. ASSOCIATION, Defendant.

Subpœna Duces Tecum.

The Territory of Arizona Send Greeting to Elias Summers:

We command you, that all and singular business and excuses being laid aside you appear and attend before our District Court of the said County of Cochise, Territory of Arizona at the Court Room thereof, in the said County of Cochise, forthwith, then and there to testify in the above entitled action now pending in said District Court, on the part of the Plaintiff and that you bring with you and produce, then and there the books of Union Acquia Company now in your custody. And disobedience will be punished as a contempt by the said Court, and you will also forfeit to the party aggrieved the sum of One Hundred Dollars, and all damages which may be sustained by your failure to attend.

Witness Hon. Fletcher M. Doan Judge of the District Court
26 of the County of Cochise, and the seal of said Court, this 4th day of November, 1905.

Attest my hand and seal of said Court the day and year last above written.

[SEAL.] GEORGE B. WILCOX, *Clerk*,
By PHILO WILCOX, *Deputy*.

(Endorsed:) Sheriff's Office, Tombstone, County of Cochise, *ss:* I hereby certify that I received the within Subpœna, on the 4th day of Nov. 1905, and personally served the same on the 4th day of Nov. 1905 on Elias Summers by showing the within original and delivering to Elias Summers personally, in Tombstone County of Cochise. R. S. Hunt, Sheriff, by W. J. Bennett, Deputy Sheriff. Dated 4th Nov. 1905. Sheriff's Fees, $.80. No. 3723. District Court, County of Cochise. The Boquillas Land & Cattle Co., Plaintiff *vs.* St. David Co-operative Com. Development Assoc., Defendant. *Subpœna Duces Tecum.* Filed Nov. 4th, 1905. Geo. B. Wilcox, Clerk. By Philo Wilcox, Deputy Clerk.

27 In the District Court of the County of Cochise, Territory of Arizona.

BOQUILLAS LAND & CATTLE CO., a Corporation, Plaintiff,
v.
ST. DAVID CO-OPERATIVE COM. DEV. CO. ET AL., Defendants.

Subpœna Duces Tecum.

The Territory of Arizona Send Greeting to Frank Hare, County Recorder of Cochise County:

We command you, that all and singular business and excuses being laid aside you appear and attend before our District Court of the said County of Cochise Territory of Arizona at the Court Room thereof, in the said County of Cochise, on the 4th day of Nov. 1905 forthwith, then and there to testify in the above entitled action now pending in said District Court, on the part of the Defendants and that you bring with you and produce then and there

Book No. 2 Deeds Real Estate.
" " 1 " " "
" " 4 " " "
" " 15 " " "
" " 2 Bills of Sale.
" " 3 " " "

now in your custody. And disobedience will be punished as a contempt by the said Court, and you will also forfeit to the
28 party aggrieved the sum of One hundred Dollars, and all damages which may be sustained by your failure to attend.

Witness Hon. F. M. Doan, Judge of the said Court of the said County of Cochise, and the seal of said Court, this 4th day of Nov. 1905.

Attest my hand and seal of the said Court the day and year last above written.

[SEAL.] GEO. B. WILCOX, *Clerk*.

(Endorsed:) Sheriff's Office, County of Cochise, *ss:* I hereby certify that I received the within Subpœna, on the 4th day of Nov. 1905, and personally served the same on the 4th day of Nov. 1905 on Frank Hare County Recorder by showing the within original to each of said witnesses personally. R. S. Hunt, Sheriff, by C. A. Wallace, Deputy Sheriff. Dated Nov. 4th, 1905. Sheriff's Fees, $.80. No. 3723. District court, County of Cochise. Boquillas Land & Cat. Co. Plaintiff, *vs.* St. David Co-operative Com. & Dev. Ass'n, Defendant. *Subpœna Duces Tecum.* Filed Nov. 4, 1905. Geo. B. Wilcox, Clerk, by Philo Wilcox, Deputy Clerk.

29 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

No. 3723.

THE BOQUILLAS LAND AND CATTLE COMPANY
v.
THE ST. DAVID CO-OPERATIVE COM. & DEV. COMPANY.

GENTLEMEN OF THE JURY: The Boquillas Land & Cattle Company, a corporation have brought suit against the St. David Co-operative Commercial and Development Association, a corporation, and the St. David Canal Company, a corporation, John Merrill, J. N. Curtis, Samuel Curtis, Joe Summers, John Summers, John Doe and Richard Roe, defendants, in which the plaintiff has alleged, among other things, that on or about the month of December 1904, the defendants, or certain persons acting as their agents or employés, entered, without the consent of the plaintiff upon the lands and premises belonging to the plaintiffs at a certain point on plaintiff's premises below Fairbank where a certain dam had existed, for the purpose of diverting the water upon the land and premises of plaintiff, and commenced to construct a dam and a canal or ditch in the said river for the purpose of diverting waters therefrom.

The facts in this case will be submitted to you for your consideration, and the legal issues will be determined by the Court.

30 The defendants deny that they or any other person or persons acting as their agents or employés either with or without the consent of the plaintiffs entered upon the premises at the point mentioned and commenced to construct a canal or ditch for the purpose of diverting waters therefrom, but they allege that in the year 1877 the predecessors and grantors in interest of the defendants erected a dam across the San Pedro River, and constructed a ditch known as the Union or Hill ditch, which in later years has been known as the Mason and Cable ditch, and appropriated through that the waters of the river for irrigation purposes, and have continued to divert and use the said water through the ditch by means of the said dam since that time until the present, and that at the time spoken of they entered the premises simply for the purpose of building a dam in place of one that had been theretofore built and

been washed out by the floods, and for the purpose of repairing the ditch or canal that had, at the former date mentioned been built by them, and been used by them from that time until the present.

It is incumbent upon the plaintiff to establish by a preponderence of the evidence the positive or affirmative allegation in his complaint that has been denied by the defendants, and on the part of the defendants where they make an affirmative allegation in their answer, it becomes incumbent upon them to support that by a preponderence of the evidence.

By a preponderence of the evidence means by the greater weight of evidence in the case. So that when you are considering an affirmative allegation by the plaintiff if you find in regard to that,
31 that the evidence is evenly balanced, you will find for the defendant on that issue, because unless the affirmative is supported by more than evenly balanced evidence, you will find against the plaintiff, who has pleaded it, and in the affirmative allegations in the answer, the burden of proof is upon the defendant and in these issues unless the defendants have established by a preponderence of the evidence the allegation, you will find against the defendants and in favor of the plaintiff.

The plaintiff has alleged that these parties have gone upon the ground for the purpose of doing this work. It is incumbent upon them to establish that fact by a preponderence of the evidence. The defendants have alleged that they have simply gone there for the purpose of building a dam in the place of the old one that was washed out and repairing the old ditch, which they had held in peac-able and adverse possession since the years 1877 or thereabouts. It will be incumbent upon them to establish their possession of that ditch by a preponderence of the evidence, and on their failure so to do, you will find for the plaintiff as to that issue.

Peac-able and adverse possession means a continuous possession during the term of years of the premises in question.

The questions of fact that will be submitted to you, I will read and they will be written out and handed to you before you retire, so that you can have them with you.

"Did the St. David Co-operative Commercial and Development Association, the St. David Canal Company, John Merrill, J. N.
32 Curtis, Samuel Curtis, John Summers named as defendants, or any of them go upon the premises of the plaintiff about the month of December 1904, and attempt to build a dam and construct a ditch or canal, and divert water from the San Padro River?"

"If part of the defendants went upon the premises for that purpose, who of the defendants was it that thus went there for that purpose?"

And if the defendants all of them or part of them went there for that purpose, was it their purpose *of* build a dam and build a canal or ditch, or was it to build a dam in the place formerly occupied by an old dam, repair the canal or ditch that had already been constructed and was there existing?"

"Did the defendants or their predecessors in interest in the year 1877 erect a dam across the San Padro River at the point named in

the pleadings, and construct a ditch therefrom known as the Mason and Cable ditch, since known as the Hill ditch or the Union?

"If the predecessors or grantors in interest of the defendants did construct said dam and ditch and did not construct it in 1877, when did they build the dam and construct such ditch?"

"If the defendants or their predecessors or grantors in interest did not openly, adversely and peac-ably use the dam and ditch and the waters that flowed therein ever since the year 1877 up to the present time, during what years, if any since 1877 up to the present time have they thus used it?"

"Did John Summers cultivate by the waters of the Hill
33 ditch any land other than the land on the Boquillas Land Grant; if so, when and how many acres?

"Did J. N. Curtis irrigate from waters of the Hill ditch any lands not on the grant; if so, how many acres".

"Did Lyman Curtis irrigate from waters of the Hill ditch any lands not on the said grant, and if so, when and how many acres?"

Did any person other than John Summers, J. N. Curtis, S. B. Curtis, Lyman Curtis irrigate from waters of the said Hill ditch any land not on the Boquillas grant; if so, for what length of time, and who were the persons who thus irrigated the land, and how many acres did each one irrigate?"

Did the Hill ditch at any time have any extension or ditch connecting it with the ditch of the St. David Canal Company?"

Did the defendants or their predecessors in interest divert water into the Hill ditch, and use the same for irrigation and domestic purposes peac-ably and adversely prior to the date of the commencement of this action, and if so when was such diversion and appropriation and adverse use made, and how long did it continue?"

Peac-able and adverse possession means continuous possession but as applied to the use of water for irrigation purposes it does not mean to use it every day or every instant of the day. It means a continuous use of it without such use having been broken in upon by the assertion of any adverse claims by any other person or by an abandonment of the use of it for an indefinite time without the expectation of renewing it as soon as repairs would be made.

34 When you have determined these matters, you may have the answer to each one of these questions written after the question by your foreman, and have the interrogatories, with your answers, attached to the verdict, and let it be returned, and in case you all agree to the interrogatories, you will have it signed by your foreman. In case only nine of you should agree, the nine may return the verdict by having the verdict and answers signed by the nine jurors who thus agree in the verdict.

FLETCHER M. DOAN, *Judge.*

(Endorsed:) No. 3723. In the District Court Second Judicial District County of Cochise Territory of Arizona. The Boquillas Land & Cattle Co., Plaintiff, *vs.* The St. David Cooperative Com. & Dev. Co., Defendant. Court's Instructions. Filed Nov. 6, 1905. Geo. B. Wilcox, Clerk.

35 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

BOQUILLAS LAND & CATTLE COMPANY, a Corporation, Plaintiff,

vs.

THE ST. DAVID CO-OPERATIVE COMMERCIAL & DEVELOPMENT ASSOCIATION, a Corporation; THE ST. DAVID CANAL COMPANY, a Corporation; JOHN MERRILL, J. N. CURTIS, SAMUEL CURTIS, JOHN SUMMERS, JOHN DOE, and RICHARD ROE, Whose Names are Unknown, Defendants.

This action having come on for trial at the city of Tombstone, before the Honorable Fletcher M. Doan, with a jury, and certain questions having been framed for submission to the jury to receive their answers thereupon as advisory to the court, and the plaintiff having offered evidence in support of the allegations of the complaint, and the defendants having offered evidence in support of the issues raised by their answer and in support of the affirmative allegations, and new matter in their answers set forth, and the plaintiff having offered evidence in rebuttal, and the case having been submitted, the said jury having rendered its verdict and having answered the various questions propounded, which verdict was duly filed with the Clerk of the court, and the court having been advised by the said verdict, and after due deliberation, does now make its decision and find the following facts and conclusions of
36 law:

Facts.

I.

That on or about the 8" day of May, 1833, the State of Sonora in the Republic of Mexico, granted and conveyed to one Captain Ygnacio Elias Gonzales and Nepomoceno Felix, their heirs successors and assigns, that certain tract of land situate at that time in the State of Sonora, Republic of Mexico, but now in the county of Cochise, Territory of Arizona, known and designated as the Rancho San Juan de las Boquillas & Nogales, the same being

A strip of land two and one-fourth (2¼) miles in width lying along, and extending to a distance of one and one-eighth (1⅛) miles on each side of the San Pedro River, said strip beginning at a point on said river about seven (7) miles above (south of) the town of Fairbanks in said county of Cochise and extending thence down, along on each side of said river as aforesaid, for a distance of about fourteen and one-half (14½) miles to a point on said river about seven and one-half (7½) miles below (north of) said town of Fairbanks.

II.

That prior to the year 1899, W. R. Hearst and Phoebe A. Hearst and Phoebe A. Hearst as administratrix with the will annexed of George Hearst, deceased, instituted an action to confirm the said

grant in the Court of Private Land Claims of the United States; that the defendants in the said action, among others, were the United States, the St. David Canal Company, the defendant in this action, J. N. Curtis, Samuel Curtis, and John Summers, defendants in this action.

That in and by said action it was found and adjudged that
37 the plaintiffs therein had acquired an undivided interest in and to the said lands hereinabove described, by conveyance executed to them by the heirs-at-law of the said original grantors hereinbefore named, and in said action, it was further adjudged on the 14" day of February, 1899, that the title to said grant and the said premises was confirmed by the said court to the said original grantees, and their successors in interest and assigns, and the decree of approval and confirmation was duly certified to the General Land Office.

That in pursuance of said decree and certification on the 14" day of December, 1900, a patent was duly issued by the United States government giving and granting unto the said Gonzales and Felix and their successors in interest and assigns the said land, together with all the hereditaments and appurtenances thereunto belonging.

III.

That thereafter and on the 3d day of July, 1901, the said W. R. Hearst and Phoebe A. Hearst duly conveyed the said lands, together with the hereditaments and appurtenances thereunto belonging to the plaintiff.

IV.

That the said San Pedro River is a natural stream of water which rises in the mountains in the State of Sonora near the boundary line between the Republic of Mexico and the said county of Cochise, and flows from said mountains down to the said county of Cochise and into and through the said county to a point in the county of Pinal where it flows into the Gila River and thence through the Colorado River to the Gulf of California and the Pacific Ocean.

That such river in such course naturally flows through the
38 said lands of said plaintiff and thereby waters and sub-irrigates and renders the same much more fertile, productive and valuable.

V.

That the title of the plaintiff and its predecessors in interest to the said lands and premises has been long in dispute, and that the right of the predecessor in interest of the plaintiff to the exclusive ownership and possession of the said lands and premises was not ascertained and determined until the year 1900, when the aforesaid patent was issued by the government of the United States; and that the title to part of the lands and premises is still wrongfully disputed by persons who have been in possession of parts thereof, and who refuse to remove therefrom and to recognize the said patent.

That by reason of the said litigation and dispute the predecessors in interest of the plaintiff, and the plaintiff have not heretofore made

actual and physical use of all of the waters of the said river; but that the flow of water in the said river is not sufficient to irrigate all of the said lands and premises, belonging to the plaintiff as aforesaid which are susceptible of irrigation.

VI.

That in the year 1877 certain persons entered upon the said lands and premises and constructed across the San Pedro River a dam at a certain point about 1½ miles below and north of the town of Fairbanks for the purpose of diverting water from the said river and constructed a canal or ditch from said point of diversion over and through portions of the said lands. That said ditch was
39 about 6 feet wide at the bottom and about 3 feet deep.

VII.

That on or about the year 1883 the said ditch was extended from its point of terminus upon the said lands to a point about seven miles north of the northern boundary line of the said grant to the town known as "Old St. Davids."

That within two years thereafter the said extension was abandoned and disused, and that no part of the same was used from that time until after the year 1902, except that the defendant J. N. Curtis from the year 1883 to and including the year 1903, irrigated through the said extension 40 acres of land lying north of and adjacent to the said northern boundary of the said grant.

VIII.

That in the year 1902, the defendant John Summers rebuilt an extension of the said ditch from its terminus upon the said last mentioned land of the said J. N. Curtis, to a point about ½ mile north of the said lands, and did during the year 1903 irrigate through such extension so built and through said original ditch about forty acres of land.

IX.

That the defendant Lyman Curtis did in or about the year 1900 construct a lateral about 200 yards long extending eastwardly from the terminus of the said ditch at the said last mentioned land of the said J. N. Curtis, and did irrigate therefrom up to and including the year 1903 about 20 acres of land.

X.

That the defendant, Sam Curtis, did in or about the year
40 1900 construct a short lateral running eastwardly from the terminus of the said ditch at the said last mentioned land of the said J. N. Curtis, and did irrigate therefrom up to and including the year 1903 about 20 acres of land.

XI.

That the total amount of land irrigated out of the said ditch and being upon the said grant, is about 260 acres.

XII.

That in the year 1901, the flood waters of the said river washed out and obliterated the said dam so constructed.

That in the year 1903 a new dam was constructed about 200 yards south of the point where the original dam was constructed, and that said dam was washed out in the winter of 1903 and 1904, and that no lands were irrigated out of the said ditch during the years 1902, 1904 or 1905.

XIII.

That prior to the year 1890, a dam was built by the defendant the St. David Canal Company, at a point in the said River on the said grant about five miles north of the point where the first dam was built as aforesaid, and about one mile south of the northern boundary of the said grant, and that a ditch or canal was constructed from said point by the St. David Canal Company from the said lands and across the land of the said grant and through other lands to the town of St. Davids.

XIV.

That at no time did the said St. David Canal Company have any interest in the said first mentioned ditch or dam constructed as aforesaid, and at no time was there any physical connection between the said ditch first constructed as aforesaid and the said ditch of
41 the St. David Canal Company, and none of the waters diverted from the said first mentioned dam were conducted or transported from the ditch so first constructed as aforesaid into the ditch of the St. David Canal Company.

XV.

That all of the above named defendants are engaged in the cultivation of farming lands by irrigation and that the value of the said land is greatly enhanced by the use of waters thereupon for purposes of irrigation, and that water for such purpose is necessary for the proper cultivation of the said land and growing crops thereupon.

XVI.

That prior to the commencement of this action neither the plaintiff nor any of its predecessors in interest except as hereinbefore found, appropriated or used any of the said waters for purposes of irrigation, but that the said plaintiff from the time of its acquisition of the said grant did use the said waters for the purpose of watering stock, and for such other uses upon the lands of the plaintiff as would follow and be appurtenant to the natural flow of the said water in the said river without any artificially constructed dams, canals or other methods of diversion.

XVII.

That in or about the month of December, 1904, the defendants without the consent of the plaintiff, entered upon the said lands and premises of the plaintiff at or above a point where the said dam was

constructed in the year 1903, and commenced and threatened to rebuild the said dam and to rebuild portions of said ditch lying upon the lands and premises of the plaintiff without the consent of
42 the plaintiff, and the said defendants intended and threatened without the consent of the plaintiff to divert waters out of the said river and through the said ditch when so constructed, into the canal or ditch of the defendant, the St. David Canal Company.

XVIII.

That the said threats were open notorious and to the effect that such diversion will be continuous and uninterrupted under claim of right and adverse to the whole world except the defendants and those acting in co-operation with them; and that the defendants unless restrained by this court, will enter upon said lands of plaintiff and will build such ditch and dam and head gate thereon, and will cause such diversion to be made and will continue the same and prevent the said waters from flowing down to, along or over the said land of the plaintiff where they would naturally flow, and that the defendants will thereby acquire an easement over the plaintiff's lands and the right as against the plaintiff to continue the said diversion and will cause great and irreparable injury to the plaintiff.

Conclusions of Law.

I.

The plaintiff is the owner in fee and entitled to the exclusive possession of the lands described in the complaint

II.

The defendants, the St. David Co-operative Commercial & Development Association and the St. David Canal Company, John Merrill, John Doe and Richard Roe, except Lyman Curtis,
43 have no right, title or interest in and to the said ditch, and no right to the use of the said ditch or to any easement over the lands of plaintiff traversed by said ditch for the diversion or carriage of any waters out of the said river.

III.

The defendant J. N. Curtis, is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 40/380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed as aforesaid and delivering the same for the use upon the said 40 acres of land of J. N. Curtis lying immediately north of the northern boundary of the said grant.

IV.

The defendant Lyman Curtis, sued as John Doe in this action, is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 20/380 of the water which would flow through a ditch of the size and grade of the said ditch first con-

structed as aforesaid and delivering the same for use upon the said 20 acres of land of the said Lyman Curtis lying immediately east of and about 200 yards from the said last mentioned land of the said J. N. Curtis.

V.

The defendant Sam Curtis is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 20/380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed as aforesaid, and delivering the same for use upon the said 20 acres of land of the said Sam Curtis, lying eastwardly and near the said last mentioned land of the said J. N. Curtis.

44

VI.

The defendant John Summers is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 40/380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed as aforesaid, and delivering the same for use upon the 40 acres of land of the said John Summers lying about ½ mile north of the said land of the said J. N. Curtis.

VII.

The said last mentioned defendants, to-wit, J. N. Curtis, Lyman Curtis, Sam Curtis and John Summers have a right, title and interest in and to and a right of way over, and an easement over and upon the lands of the plaintiff for the purpose of building a dam and a ditch or canal not over six feet wide at the bottom and three feet deep, and that the said defendants and the plaintiff each have the right to use a proportionate part of the water flowing through the said ditch, in the ratio of their respective acreages as hereinbefore found, provided, however, that neither the plaintiff nor any one of the said defendants shall have the right to the carriage of said water through the said ditch or to use any of the waters flowing through the same unless such plaintiff or defendant shall have contributed his proportionate share to the construction and maintenance of said canal, dam and ditch, or shall pay to the parties hereto who may construct and maintain said dam and ditch a reasonable and satisfactory charge for the carriage and delivery of the said water.

VIII.

That the plaintiff is entitled to judgment enjoining all of
45 the said defendants except J. N. Curtis, Lyman Curtis, Sam Curtis and John Summers from entering upon the lands of the plaintiff at the points heretofore named, for any purpose whatever, or from building a canal or ditch or dam over the lands of the said grant, at any place or places, except the places mentioned in paragraph XIII of the Findings of Fact herein, until duly authorized thereunto by proper proceedings at law.

IX.

That the plaintiff is entitled to judgment against the St. David Canal Company for the full amount of jury fees paid by the plaintiff, and, in addition thereto, for one half of the plaintiff's costs, and that the defendants J. N. Curtis, Lyman Curtis, Sam Curtis and John Summers are entitled to judgment, each for his respective costs herein.

X.

That the findings, conclusions and judgment in this cause are not intended to in any wise affect the rights of the owners of the St. Davids ditch or canal mentioned in Paragraph 13 of the findings to the said St. David ditch or canal.

FLETCHER M. DOAN, *Judge.*

(Endorsed:) 3723. District Ct., Cochise County. Boquillas Land & Cattle Co., Plaintiff, *vs.* The St. David Co-operative Commercial and Development Company *et al.*, Defendants. Findings of fact and conclusions of law. Filed April 21, 1906. Geo. B. Wilcox, Clerk.

46 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

BOQUILLAS LAND & CATTLE COMPANY, a Corporation, Plaintiff,

vs.

THE ST. DAVID CO-OPERATIVE COMMERCIAL & DEVELOPMENT ASCIATION, a Corporation; THE ST. DAVID CANAL COMPANY, a Corporation; JOHN MERRILL, J. N. CURTIS, SAMUEL CURTIS, JOHN SUMMERS, JOHN DOE, and RICHARD ROE, Whose Names Are Unknown, Defendants.

Judgment.

This action having come on for trial at the city of Tombstone, before the Honorable Fletcher M. Doan, with a jury, and certain questions having been framed for submission to the jury to receive their answers thereupon as advisory to the court, and the plaintiff having offered evidence in support of the allegations of the complaint, and the defendants having offered evidence in support of the issues raised by their answer and in support of the affirmative allegations, and new matter in their answers set forth, and the plaintiff having offered evidence in rebuttal, and the case having been submitted, the said jury having rendered its verdict and having answered the various questions propounded, which verdict was duly filed with the Clerk of the Court, and the Court having been advised by the said verdict, and after due deliberation having rendered and filed its decision separately stating the facts found and
47 the conclusions of law, now upon motion of Eugene S. Ives, attorney for the plaintiff, it is ordered, adjudged and decreed

1. That the plaintiff is the owner in fee and entitled to the exclusive possession of that certain tract of land situate in the county of Cochise, Territory of Arizona, known and designated as the Rancho San Juan de las Boquillas y Nogales the same being

A strip of land two and one-fourth (2¼) miles in width lying along, and extending to a distance of one and one-eighth (1⅛) miles on each side of the San Pedro River, said strip beginning at a point on said river about seven (7) miles above (south of) the town of Fairbank in said county of Cochise and extending thence down, along and on each side of said river as aforesaid, for a distance of about fourteen and one-half (14½) miles to a point on said river about seven and one-half (7½) miles below (north of) said town of Fairbank.

2. The defendants the St. David Co-operative Commerical & Development Association, The St. David Canal Company, John Merrill, John Doe and Richard Roe, except Lyman Curtis, have no right, title or interest in and to that certain dam constructed across the San Pedro River at a point about 1½ miles below and north of the town of Fairbank, and have no right, title or interest in or to that certain ditch constructed from about the point where said dam was constructed over and across the lands and premises of the plaintiff, the said dam and ditch being commonly known under the two names Union Canal and Hill Canal, and the said de-
48 fendants have no right to the use of the said ditch or to any easement over the lands of the plaintiff traversed by said ditch for the diversion or carriage through said ditch of any waters out of the said river.

3. The defendant J. N. Curtis, is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 40/380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed as aforesaid and delivering the same for the use upon the said 40 acres of land of J. N. Curtis lying immediately north of the northern boundary of the said grant.

4. The defendant Lyman Curtis, sued as John Doe in this action, is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 20/380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed as aforesaid, and delivering the same for use upon the said 20 acres of land of the said Lyman Curtis lying immediately east of and about 200 yards from the said last mentioned land of the said J. N. Curtis.

5. The defendant Samuel Curtis is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 20/380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed as aforesaid, and delivering the same for use upon the said 20 acres of land of the said Samuel Curtis, lying eastwardly and near the said last mentioned land of the said J. N. Curtis.

6. The defendant John Summers is entitled to construct or aid in

the construction of said dam and ditch for the purpose of
49 conveying 40/380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed as aforesaid, and delivering the same for use upon the 40 acres of land of the said John Summers lying about ½ mile north of the said land of the said J. N. Curtis.

7. The said last mentioned defendants, to-wit, J. N. Curtis, Lyman Curtis, Sam Curtis and John Summers have a right title and interest in and to, and a right of way over, and an easement over and upon the lands of the plaintiff for the purpose of building a dam and a ditch or canal not over six feet wide at the bottom and three feet deep, and the said defendants and the plaintiff each have the right to convey for delivery and use upon their said land a proportionate part of the water flowing through the said ditch, in the ratio of their respective acreages as hereinbefore found, provided, however, that neither the plaintiff nor any one of the said defendants shall have the right to the carriage of said water through the said ditch or to the delivery through said ditch for use any of the waters flowing through the same unless such plaintiff or defendant shall have contributed his proportionate share to the construction and maintenance of said canal, dam and ditch, or shall pay to the parties hereto who may construct and maintain said dam and ditch a reasonable and satisfactory charge for the carriage and delivery of the said water.

8. That the defendants the St. David Co-operative Commercial & Development Association, The St. David Canal Company, John Merrill, John Doe and Richard Roe, except Lyman Curtis, be and each of them is perpetually enjoined and restrained from
50 entering upon the lands of the plaintiff for any purpose whatever and from building a canal or ditch or dam over the lands of the plaintiff at any place or places except that the said defendants are not enjoined from entering upon the said lands of the plaintiff and maintaining and constructing a dam, ditch or canal at a certain point about one mile south of the northern boundary of the land grant known and designated as the Rancho San Juan de las Boquillas y Nogales the rights of the plaintiff and of the defendants with respect to the building and operating a dam, canal or ditch from said point northerly through the lands of the plaintiff not being considered or adjudicated herein.

9. That the plaintiff recover of the defendant, The St. David Canal Company $— its costs; that the defendant Lyman Curtis, sued as John Doe, recover of the plaintiff $— his costs; that the defendant Sam Curtis recover of the plaintiff $— his costs; and that the defendant J. N. Curtis recover of the plaintiff $— his costs.

FLETCHER M. DOAN, *Judge.*

(Endorsed:) 3723. District Ct. Cochise Co. Boquillas Land & Cattle Co. Plaintiff, *vs.* The St. David Co-operative Commercial & Development Ass'n *et al.*, Defendants. Judgment. Filed Nov. 2, 1906, 5 o'clock P. M. as of April 21, 1906. Geo. B. Wilcox, Clerk.

51 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

BOQUILLAS LAND AND CATTLE COMPANY, a Corporation, Plaintiff,
vs.
The ST. DAVID CANAL COMPANY and Others, Defendants.

Now comes the plaintiff and moves for a new trial as against the following defendants, to-wit: J. N. Curtis, Sam Curtis, Lyman Curtis and John Summers, on the following grounds:

1.

That the court erred in admitting evidence.

2.

That the court erred in rejecting evidence.

3.

That the court erred in charging the jury.

4.

That the court erred in refusing instructions asked.

5.

On the ground that the evidence does not sustain the verdict.

6.

On the ground that the evidence does not sustain the judgment.

52 Dated Tucson, Arizona, March —, 1906.

EUGENE S. IVES,
Att'y for Pl'ff.

(Endorsed:) #3723. District Ct., Cochise County. Boquillas Land & Cattle Co., Plaintiff, *vs.* St. David Canal Co. *et al.*, Defendants. Motion for New Trial. Rec'd Copy this April 20, 1906. Pickett & Bowman, Ben Goodrich, Att'y- for Def'ts. Filed April 21, 1906. Geo. B. Wilcox, Clerk District Court, by Philo Wilcox, Deputy.

53 In the District Court of the Second Judicial District of the Territory of Arizona in and for Cochise County.

BOQUILLAS LAND & CATTLE COMPANY, a Corporation, Plaintiff,
vs.
ST. DAVID CANAL COMPANY and Others, Defendants.

Now come the defendants and move for a new trial on the following grounds, to wit:

1. That the court erred in admitting evidence.
2. That the court erred in rejecting evidence.

3. That the court erred in charging the jury.
4. That the court erred in refusing instructions asked.
5. On the ground that the evidence does not sustain the verdict.
6. On the ground that the evidence does not sustain the judgment.

PICKETT & BOWMAN,
BEN GOODRICH,
Attorneys for Defendants.

Dated this April 21st, 1906.

(Endorsed:) No. 3723. Boquillas Land & Cattle Co. *v.* St. Davids Cooperative Com. & Dev. Ass'n. Def'ts' Motion for new trial. Rec'd Copy this April 21, 1906. Eugene S. Ives Att'y for Pl'ff. Filed Apr. 21, 1906. Geo. B. Wilcox, Clerk District Court, by Philo Wilcox, Deputy.

54 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

No. 3723.

BOQUILLAS LAND AND CATTLE COMPANY, a Corporation, Plaintiff,
vs.
ST. DAVID CANAL COMPANY and Others, Defendants.

Memorandum of Costs.

Clerk's fees	$20.00
Sheriff's fees, serving subpœnas	4.00
Sheriff's mileage " "	36.00
Witness fees and mileage:	
Bob Fenter	12.00
Geo. Kennison	12.00
Ygnacio Montijo	11.70
Tom Larrieu	12.00
Al Noyes	10.00
Robt. Reed	10.65
Oscar Ashburn	4.65
Alejandro Escalante	11.70
Bill Gray	7.80
W. C. Land	10.00
Jose Valencia	12.00
Fred Bennett	13.00
Geo. Dolphin	13.00
Jas. Herrich	12.75
Notary's fees:	
Deposition Jas. Herrick	6.00
	$219.25
½ above amount, as per judgment	$109.62½
Jury fees	

55 TERRITORY OF ARIZONA, *County of Pima, ss:*

Eugene S. Ives being duly sworn, says: that he is the attorney for the plaintiff in the above entitled action, and that the foregoing is a true and correct statement of the costs paid by the plaintiff in said action, and as deponent verily believes were necessarily incurred in the prosecution and trial of the said cause.

EUGENE S. IVES.

Subscribed and sworn to before me this 17" day of April, 1906.
My commission expires May 29", 1907.
[SEAL.] JOSIE B. HENDERSON,
Notary Public.

(Endorsed:) #3723. District Court, Cochise County. Boquillas Land & Cattle Co. Plaintiff, *vs.* St. David Canal Co., *et al.* Defendants. Bill of Costs. Filed Apr. 21, 1906. Geo. B. Wilcox, Clerk District Court, by Philo Wilcox, Deputy.

56 In the District Court of the Second Judicial District of the Territory of Arizona, County of Cochise.

BOQUILLAS LAND & CATTLE COMPANY, a Corporation, Plaintiff,
vs.
THE ST. DAVID CO-OPERATIVE COMMERCIAL & DEVELOPMENT ASS'N, a Corp., ET AL., Defendants.

I, the undersigned Clerk of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, do hereby certify the foregoing to be a true copy of the Judgment entered in the above entitled action, and recorded in Judgment Book 5 of said Court, at Page 470 *et seq.* And I further certify that the foregoing papers hereto annexed, constitute the Judgment Roll in said action.

Witness my hand and the seal of the District Court this 3rd day of November 1906.

———.

(Endorsed:) No. 3723. In the District Court Second Judicial District County of Cochise Territory of Arizona. Boquillas L. & C. Co. Plaintiff *vs.* St. David Co-op. Co. & Dev. Ass'n *et al.* Defendant. Judgment Roll. Filed Nov. 3rd, 1906. No. 988. Supreme Court. Territory of Arizona. Boquillas L. & C. Co. *vs.* St. David Co-op. Com. & Dev. Ass'n *et al.* Judgment Roll. Filed Nov. 23, 1906. S. M. Cullom, Clerk, by Angie B. Parker, Deputy.

57 In the District Court, Second Judicial District of the Territory of Arizona in and for the County of Cochise.

No. 3723.

BOQUILLAS LAND AND CATTLE COMPANY, a Corporation, Plaintiff,
vs.
THE ST. DAVID CO-OPERATIVE COMMERCIAL AND DEVELOPMENT ASSOCIATION, a Corporation, ET AL., Defendants.

We the jury, duly impannelled and sworn in the above entitled cause, upon our oaths do find the answers to the questions submitted to us herein—as indicated by the within answers to the questions attached hereto.

G. H. McKENZIE, *Foreman.*

1. Did the St. Davis Co-operative Commercial and Developing Association, or the St. David Canal Company, John Merrill, J. N. Curtis, Samuel Curtis, John Summers, named as defendants, or any of them go upon the premises of the plaintiff about the month of December 1904 and attempt to build a dam and to construct a ditch or canal, and divert the water from the San Padro River?
Plaintiff. Yes.

GEO. H. McKENZIE, *Foreman.*

58 2. If part of the defendants went upon the premises for that purpose, who of the defendants was it that thus went there for that purpose?
Plaintiff. Yes.

GEO. H. McKENZIE, *Foreman.*

3. And if the defendants all of them, or part of them went there for that purpose, was it their purpose *of* build a dam and build a canal or ditch, or was it to build a dam in the place formerly occupied by an old dam, repair the canal or ditch that had already been constructed and was there existing?
Plaintiff. Construct New Dam.

GEO. H. McKENZIE, *Foreman.*

4. Did the defendants or their predecessors in interest in the year 1877 erect a dam across the San Padro River at the point named in the pleadings, and construct a ditch therefrom known as the Mason & Cable ditch, since known as the Hill ditch or the Union Asequia?
Defendant. Yes.

GEO. H. McKENZIE, *Foreman.*

5. If the predecessors or grantors in interest of the defendants did not construct said dam and ditch and did not construct it in 1877, when did they build the dam and construct such ditch?
Defendant. Yes.

GEO. H. McKENZIE, *Foreman.*

59 6. If the defendants or their predecessors or grantors in interest did not openly, adversely and peac-ably use the dam and ditch, and the waters that flowed therein adversely and peac-ably ever since the year 1877 up to the present time, what years if any since 1877 up to the present time have they thus used it?

Defendant. Yes.

G. H. McKENZIE, *Foreman.*

7. Did John Summers cultivate by the waters from the Hill ditch any land other than the land on the Boquillas Land Grant, and if so when and how many acres?

Defendant. Yes.

G. H. McKENZIE, *Foreman.*

8. Did J. N. Curtis irrigate from waters of the Hill ditch any lands not on the Grant, and if so, how many acres?

Defendant. Yes.

GEO. H. McKENZIE, *Foreman.*

9. Did Lyman Curtis irrigate from waters of the Hill Ditch any lands not on the said Grant, and if so when and how many acres?

Defendant. Yes.

GEO. H. McKENZIE, *Foreman.*

10. Did any other person other than John Summers, J. N. Curtis, S. B. Curtis and Lyman Curtis irrigate from waters of the said Hill Ditch any land not on the Boquillas Grant, and if so for what
60 length of time, who were the persons who thus irrigated the land, and how many acres did each one irrigate?

Defendant. Yes.

G. H. McKENZIE, *Foreman.*

11. Did the Hill Ditch at any time have any extension or ditch connecting it with the ditch of the St. David Canal Company?

Plaintiff. No ditch.

G. H. McKENZIE, *Foreman.*

12. Did the defendants or their predecessors in interest divert waters into the Hill Ditch, and use the same for irrigation, and domestic purposes peac-ably and adversely prior to the date of the commencement of this action, and if so when was such diversion and appropriation and adverse use made, and how long did it continue?

Defendant. Yes.

GEO. H. McKENZIE, *Foreman.*

(Endorsed:) No. 3723. In the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise. Boquillas Land and Cattle Co., Plaintiff, *vs.* St. David Co-operative Com. & Dev. Co., Defendant. Verdict. Filed Nov. 7, 1905. Geo. B. Wilcox, Clerk. No. 988. Supreme Court. Boquillas L & C Co. *vs.* St. David Co-op. C. & D. Ass'n *et al.*, Exhibit. Filed Nov. 23, 1906. S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

61 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

BOQUILLAS LAND & CATTLE COMPANY, a Corporation, Plaintiff in Error,

vs.

THE ST. DAVID CO-OPERATIVE COMMERCIAL AND DEVELOPMENT ASSOCIATION, a Corporation; THE ST. DAVID CANAL COMPANY, a Corporation; JOHN MERRILL, J. N. CURTIS, SAMUEL CURTIS, JOHN SUMMERS, JOHN DOE, and RICHARD ROE, Whose Names Are Unknown, Defendants in Error.

To the Clerk of the District Court of the Second Judicial District in and for the County of Cochise:

Now comes the Boquillas Land & Cattle Company, a corporation, the above named plaintiff in error, and petitions that a writ of error be allowed, and alleges and avers:

I.

The plaintiff is a corporation organized under the laws of the State of California, with its principal place of business in the city of San Francisco, in said State, and is duly authorized to hold property, real and personal, to transact business in the Territory of Arizona, county of Cochise; that the defendants The St. David Co-operative Commercial & Development Association, a corporation, and
62 the St. David Canal Company, a corporation, are corporations organized under the laws of the Territory of Arizona with their principal respective places of business in the county of Cochise, in said Territory; that the defendants John Merrill, J. N. Curtis, Samuel Curtis, John Summers and Lyman Curtis sued as John Doe, reside in the county of Cochise in the said Territory.

II.

That heretofore, and on the — day of —— 19— an action was commenced in the above named district court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, wherein the above named plaintiff in error was plaintiff, and wherein the above named defendants in error were defendants.

That the said action came on for trial before the Honorable Fletcher M. Doan, sitting at Tombstone, in the said county of Cochise, with a jury and that certain special issues were framed and submitted to the said jury, and that the jury did on or about the — day of November, 1905, bring in its verdict upon the said issues, and that the said court did render judgment and make its decision in writing, wherein its findings of fact and conclusions of law were stated separately and that on the 2 day of November, 1905, judgment was duly entered in the said action in accordance with the said decision as aforesaid, by which said judgment it was ordered, adjudged and decreed as follows, to-wit:

63 Ordered, Adjudged and Decreed

1. That the plaintiff is the owner in fee and entitled to the exclusive possession of that certain tract of land situate in the county of Cochise, Territory of Arizona, known and designated as the Rancho San Juan de las Boquillas y Nogales the same being

A strip of land two and one-fourth (2¼) miles in width lying along, and extending to a distance of one and one-eighth (1⅛) miles on each side of the San Pedro River, said strip beginning at a point on said river about seven (7) miles above (south of) the town of Fairbank in said county of Cochise and extending thence down, along and on each side of said river as aforesaid, for a distance of about fourteen and one-half (14½) miles to a point on said river about seven and one-half (7½) miles below (north of) said town of Fairbank.

2. The defendants the St. David Co-operative Commercial & Development Association, The St. David Canal Company, John Merrill, John Doe and Richard Roe, except Lyman Curtis, have no right, title or interest in and to that certain dam constructed across the San Pedro River at a point about 1½ miles below and north of the town of Fairbank, and have no right, title or interest in or to that certain ditch constructed from about the point where said dam was constructed over and across the lands and premises of the plaintiff, the said dam and ditch being commonly known under the two names Union Canal and Hill Canal, and the said defendants have no right to the use of the said ditch or to any easement over the

64 lands of the plaintiff traversed by said ditch for the diversion or carriage through said ditch of any waters out of the said river.

3. The defendant J. N. Curtis, is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 40/380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed as aforesaid and delivering the same for the use upon the said 40 acres of land of J. N. Curtis lying immediately north of the northern boundary of the said grant.

4. The defendant Lyman Curtis, sued as John Doe in this action, is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 20/380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed as aforesaid, and delivering the same for use upon the said 20 acres of land of the said Lyman Curtis lying immediately east of and about 200 yards from the said last mentioned land of the said J. N. Curtis.

5. The defendant Samuel Curtis is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 20/380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed as aforesaid, and delivering the same for use upon the said 20 acres of land of the said Samuel Curtis, lying eastwardly and near the said last mentioned land of the said J. N. Curtis.

6. The defendant John Summers is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying

40/380 of the water which would flow through a ditch of the
65 size and grade of the said ditch first constructed as aforesaid, and delivering the same for use upon the 40 acres of land of the said John Summers lying about ½ mile north of the said land of the said J. N. Curtis.

7. The said last mentioned defendants, to-wit, J. N. Curtis, Lyman Curtis, Sam Curtis and John Summers have a right, title and interest in and to, and a right of way over, and an easement over and upon the lands of the plaintiff for the purpose of building a dam and a ditch or canal not over six feet wide at the bottom and three feet deep, and the said defendants and the plaintiff each have the right to convey for delivery and use upon their said land a proportionate part of the water flowing through the said ditch, in the ratio of their respective acreages as hereinbefore found, provided, however, that neither the plaintiff nor any one of the said defendants shall have the right to the carriage of said water through the said ditch or to the delivery through said ditch for use any of the waters flowing through the same unless such plaintiff or defendant shall have contributed his proportionate share to the construction and maintenance of said canal, dam and ditch, or shall pay to the parties hereto who may construct and maintain said dam and ditch a reasonable and satisfactory charge for the carriage and delivery of the said water.

8. That the defendants the St. David Co-operative Commercial & Development Association, The St. David Canal Company, John Merrill, John Doe and Richard Roe, except Lyman Curtis, be and each of them is perpetually enjoined and restrained from entering
66 upon the lands of the plaintiff for any purpose whatever and from building a canal or ditch or dam over the lands of the plaintiff at any place or places except that the said defendants are not enjoined from entering upon the said lands of the plaintiff and maintaining and constructing a dam, ditch or canal at a certain point about one mile south of the northern boundary of the land grant known and designated as the Rancho San Juan de las Boquillas y Nogales the rights of the plaintiff and of the defendants with respect to the building and operating a dam, canal or ditch from said point northerly through the lands of the plaintiff not being considered or adjudicated herein.

9. That the plaintiff recover of the defendant, The St. David Canal Company $— its costs; that the defendant Lyman Curtis, sued as John Doe, recover of the plaintiff $—, his costs; that the defendant Sam Curtis recover of the plaintiff $—, his costs; and that the defendant J. N. Curtis recover of the plaintiff $—, his costs.

(Signed) FLETCHER M. DOAN, *Judge.*

III.

That your petitioner desires to remove the said judgment to the Supreme Court of the Territory for revision and correction.

Wherefore, your petitioner asks that you, the clerk of the said court aforesaid, do forthwith issue a summons in accordance with law for the said defendants in error and each of them, describing

the said judgment and stating that the writ of error petitioned
67 for has been granted, and requiring the defendants in error and each of them to appear and defend said writ before the supreme court of the Territory of Arizona, at the next term thereof, to be held at the city of Phoenix on the second Monday of January, 1907.

BOQUILLAS LAND & CATTLE CO.,
Per EUGENE S. IVES, *Att'y.*

(Endorsed:) #3723. District Ct., Cochise Co. Boquillas Land & Cattle Co., Plaintiff, *vs.* The St. David Co-operative Commercial & Development Ass'n *et al.*, Defendants. Petition for Writ of Error. Filed Nov. 2, 1906. 5:15 P. M. Geo. B. Wilcox, Clerk.

(Endorsed:) No. 988. Supreme Court Territory of Arizona. Boquillas L & C Co. *vs.* St. David Co-op. Com. & Dev. Ass'n *et al.* Petition for Writ of Error. Filed Nov. 23, 1906. S. M. Cullom, Clerk, by Angie B. Parker, Deputy.

68 December Term, A. D. 1904.

MONDAY, *April* 3, 1905.

The District Court of the Second Judicial Diatrict of the Territory of Arizona, in and for the County of Cochise, convened pursuant to recess of Jan. 7th, 1905, at 9 o'clock, A. M.

Present: Hon. Fletcher M. Doan, Judge.
Thomas Flannigan, Dist. Att'y.
R. S. Hunt, Sheriff.
Geo. B. Wilcox, Clerk.

Court was opened by the officers according to law.

Be it remembered that upon the above date, the following proceedings were had in the above entitled Court, to-wit:

No. 3723.

BOQUILLAS LAND AND CATTLE COMPANY
vs.
ST. DAVID COMMERCIAL AND DEVELOPMENT CO. ET AL.

By consent of counsel, It is ordered by the Court that this case be continued for the term.

FLETCHER M. DOAN, *Judge.*

April Term, A. D. 1905.

MONDAY, *May 8th*, 1905.

The District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, convened
69 pursuant to adjournment, at 9 o'clock, A. M.

Present: Hon. Fletcher M. Doan, Judge.
Thos. Flannigan, Dist. Att'y.
R. S. Hunt, Sheriff.
Geo. B. Wilcox, Clerk.

Court was opened by the officers according to law.

No. 3723.

BOQUILLAS LAND AND CATTLE CO.
vs.
THE ST. DAVID CO-OPERATIVE COM. AND DEV. ASS'N.

Order Entering Associate Counsel.

On motion of Ben Goodrich, Esq., attorney for defendant, it is by the court ordered that Pickett and Bowman be entered as associate counsel for the defendant herein.

Title of Court and Cause.

JUNE 30TH, 1905.

3723.

BOQUILLAS LAND & CATTLE CO., a Corporation,
vs.
THE ST. DAVID CO-OPERATIVE COM. AND DEV. ASS'N.

Upon a motion made by defendant's attorney, it is by the Court ordered that the hearing of motion be set for July 13th, 1905.

FRIDAY, *July 14th*, 1905.

3723.

BOQUILLAS LAND AND CATTLE CO.
vs.
THE ST. DAVID CO-OPERATIVE COM. AND DEV. ASS'N.

Order Dissolving Temporary Restraining Order.

Comes now the counsel for the plaintiff herein and moves the court to continue the hearing of application for an injunction
70 to the next term of this court. And the Court being now fully advised in the premises orders that this case be and the same is hereby continued for the term, and the same hereby set for trial October 24th, 1905.

It is further ordered that the restraining order heretofore made in this case be set aside and dissolved.

FLETCHER M. DOAN, *Judge.*

October Term, A. D., 1905.

MONDAY, *October 23rd*, 1905.

The District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, convened this 23rd day of October pursuant to law at 9:00 o'clock, A. M.

Present: Hon. Fletcher M. Doan, Judge.
Thos. E. Flannigan, Dist. Att'y.
R. S. Hunt, Sheriff.
Geo. B. Wilcox, Clerk.

BOQUILLAS LAND & CATTLE CO., a Corporation, Plaintiff,
vs.
THE ST. DAVID CO-OPERATIVE COM. & DEVELOPMENT CO.,
Defendant.

Order Resetting Trial.

By consent of parties hereto, it is by the Court ordered that this case be reset for trial October 31st, 1905.

71 Title of Court and Cause.

FRIDAY, *November 3d*, 1905.

3723.

BOQUILLAS LAND & CATTLE CO., Plaintiff,
vs.
THE ST. DAVID CO-OPERATIVE COM. & DEVELOPMENT ASS'N,
Defendant.

Trial of Cause.

This cause coming on this day regularly for trial the Plaintiff appearing by its counsel, Eugene S. Ives, Esq., and the defendant appearing by counsel Ben Goodrich, Esq., and Messrs. Pickett & Bowman. All parties announcing ready for the trial the Clerk was ordered to draw from the box wherein he had deposited in the presence of the Court the names of all persons summoned to serve as trial jurors and not excused, the names of twenty persons. Whereupon the clerk drew from the box the names of twenty persons, all answering to their names took their places in the jury box. The jurors in the jury box were thereupon sworn and examined on their *voir dire*. Whereupon F. N. Wolcott was challenged and excused for cause, and the clerk drew from the box the name of Rye Miles who was sworn and examined upon his *voir dire*. Wm. Featherman was challenged and excused for cause and the clerk drew from the box the name of J. M. Edgar who was sworn and examined on his *voir dire*. J. A. Covey was challenged and excused for cause whereupon the clerk drew from the box the name of J. B. Miano who was sworn and examined on his *voir dire*. Tom Whitley was challenged and excused for cause and the clerk thereupon drew from the box the name of John Rock who was sworn and examined on his *voir dire*. J. N. Christianson was challenged and excused for cause and the clerk drew from the box the name of Harry Eckerman who was sworn and examined on his *voir dire*. Joseph McPherson
72 was challenged and excused for cause, whereupon the clerk drew from the box the name of Ben Heney who was sworn and examined on his *voir dire*. J. B. Miano was challenged and excused for cause and the clerk drew from the box the name of R. H. Sneed who was sworn and examined on his *voir dire*. John Rock

was challenged and excused for cause and the clerk drew from the box the name of J. M. Montana who was sworn and examined on his *voir dire*. Harry Eckerman was challenged and excused for cause, whereupon the clerk drew from the box the name of Nelson Stevenson who was sworn and examined on his *voir dire*. Ben Heney was challenged and excused for cause and the clerk drew from the box the name of C. E. Buchner who was sworn and examined on his *voir dire*. R. H. Sneed was challenged and excused for cause and the clerk drew from the box the name of Geo. P. Frisinger who was sworn and examined on his *voir dire*. J. M. Montana was challenged and excused for cause and the clerk drew from the box the name of Bert Beach who was sworn and examined upon his *voir dire*. C. E. Buchner was challenged and excused for cause and the clerk drew from the box the name of J. H. Beare who was sworn and examined upon his *voir dire*. The panel being now full and complete and the jurors in the jury box having been passed for cause, and the prosecution and defense having exercised their respective right of peremptory challenges, the following twelve persons were called according to law to constitute the jury, viz.: Arthur Weeks; Peter Bute; J. D. Walker; Walter Dority; Geo. McKenzie; E. A. Fletcher; Robert Joyce; Ollie Simpson, J. M. Edgar; Nelson Stevenson; Bert Beach; and J. H. Beare, who were duly sworn to well and truly try the cause at issue joined between Boquillas
73 Land and Cattle Company, Plaintiff *vs.* The St. David Co-operative Com. & Dev. Assn. Defendant. Whereupon the case proceeds to trial. The counsel for the plaintiff herein read the complaint herein aloud to the jury and the counsel for the defense read the answer herein aloud to the jury. This being the regular time for the noon recess, it is by the Court ordered that this case be and the same is hereby continued until 2 o'clock P. M. this day. The Court admonished the jury as required by law and they retire in charge of their Bailiffs, Brown and Williams officers of this Court, sworn for this purpose, who were instructed to return said jury into Court at 2 o'clock P. M. this day to which time this case is continued.

After Recess.

BOQUILLAS LAND & CATTLE CO., Plaintiff,
vs.
THE ST. DAVID CO-OPERATIVE COM. & DEV. ASS'N, Defendant.

This case having been continued from the forenoon session of this Court, come now all parties herein and announcing ready for trial, the jury being in the jury box and all answering to their names respectively the trial proceeds as follows: The plaintiff to maintain upon its part the issues herein calls as witness James Herrick who was sworn and examined. Whereupon all witnesses were called and placed under the rule of the Court. Certain documentary evidence was introduced and H. K. Street was called sworn and examined and cross-examined. The plaintiff rests. The defendant

to maintain upon its part the issues herein calls E. F. Hub-
74 bard and J. S. Merrill who were sworn and examined and cross-examined and the case was thereupon continued to 8:30 o'clock A. M. tomorrow. The jury was instructed by the Court as required by law and they retire in charge of their Bailiffs Brown and Williams who are officers of this Court sworn for the purpose, and they were instructed by the Court to return said jury into Court at 8:30 o'clock A. M., Saturday November 4th, 1905.

Title of Court and Cause.

SATURDAY, *November 4th*, 1905.

BOQUILLAS LAND & CATTLE COMPANY, Plaintiff,
vs.
THE ST. DAVID CO-OPERATIVE COM. & DEV. ASS'N, Defendant.

This cause having been continued from yesterday's session of this Court comes now all parties herein, into Court and announcing ready for trial, the jury being in the jury box and all answering to their names respectively, the case proceeds to trial as follows: The defendant to maintain upon its part the issues herein calls as witnesses the following named persons, to-wit: Joseph McRae; J. W. Curtis; John Montgomery; and A. Curtis who were sworn and examined and cross-examined, whereupon the case was ordered continued until 2:00 P. M. this day. The jury was ordered by the Court as required by law and said jury retire in charge of their Bailiffs, Williams and Frank Brown, officers of this Court sworn for this purpose, and said Bailiffs were instructed by the Court to return said jury into Court at 2:00 o'clock P. M. this day to which time this case is hereby ordered continued.

75 After Recess.

BOQUILLAS LAND AND CATTLE COMPANY, Plaintiff,
vs.
THE ST. DAVID CO-OPERATIVE COM. & DEV. ASS'N, Defendant.

Resumption of Trial.

This cause having been continued from the forenoon session of this court comes now all parties hereto and announcing ready for trial and the jury in the jury box and their names being — and all answering thereto respectively the trial proceeds as follows: The defendant to maintain upon its part the issues therein offers certain documentary evidence and calls as witnesses the following named persons who were sworn and examined and cross-examined: Elias Summers; Wallace W. Wild; S. P. Curtis; Lyman Curtis and Benjamin Lofgren.

This being the regular time of the intermission of this Court, it is by the Court ordered that this case be and the same is hereby continued to 8:30 o'clock A. M. Monday, November 6th, 1905.

The jury was admonished by the Court as required by law and Bailiffs Brown and Williams ordered to return said jury into Court at the time when this case is ordered continued for further hearing. The jury retire in charge of their Bailiffs, officers of this Court sworn for this purpose.

76 October Term, 1905.

MONDAY, *November 6th*, 1905.

Title of Court.

BOQUILLAS LAND & CATTLE COMPANY, Plaintiff,
vs.
THE ST. DAVID CO-OPERATIVE COM. & DEV. ASS'N, Defendant.

Resumption of Trial.

This cause having been continued from the session of this Court of Saturday November 4th, comes now all parties herein into open Court and announcing ready for trial the jury being in the jury box and all answering to their respective names the case proceeds as follows: The defendant to maintain upon its part the issues herein called as witnesses the following named persons: Peter Crane; who was sworn and examined and cross-examined, J. N. Curtis and S. P. Curtis were recalled and the defendant rests. The plaintiff to further maintain upon its part the issues herein called in rebuttal W. S. Gray; Fred S. Bennett; W. C. Land; A. V. Noyes; Oscar Ashburn Geo. Kennison; who were sworn and examined and cross-examined and H. K. Street was recalled. This being the regular hour for the noon recess it is by the Court ordered that this case be and the same is hereby continued to 2:00 P. M. this day. The jury were admonished by the Court as required by law and they retire in charge of their Bailiffs Brown and Williams who were duly sworn to return said jury into Court at 2:00 o'clock P. M. this day.

77 After Recess.

BOQUILLAS LAND & CATTLE COMPANY, Plaintiff,
vs.
THE ST. DAVID CO-OPERATIVE COM. & DEV. ASS'N, Defendant.

Resumption of Case.

All parties hereto being present in open court come now the jury in *in* charge of their Bailiffs their names are called and all answering thereto respectively, the trial proceeds as follows: The plaintiff to further maintain upon its part the issues herein calls as witnesses A. H. Emanuel and Robert Fenters who were sworn and examined and cross-examined and the plaintiff rests.

The defendant to still further maintain upon its part the issues herein calls in rebuttal J. N. Curtis, Sr. and Lyman Curtis. The

defense rests. There being no other evidence offered and the evidence being declared closed the Court instructed the jury and the said case being now fully submitted to the jury, after argument of the respective counsel they retire in charge of their Bailiffs, Frank Brown and Williams, officers of this Court, first duly sworn for that purpose, to consider of their verdict.

78 October Term, 1905.

TUESDAY, *November 7th*, 1905.

Title of Court.

3723.

BOQUILLAS LAND & CATTLE COMPANY, Plaintiff,
vs.
THE ST. DAVID CO-OPERATIVE COM. & DEV. ASS'N, Defendant.

Verdict of Jury.

All parties being present in open Court, comes now the jury herein, in charge of their bailiffs, and all answering to their names respectively and being asked if they have agreed upon a verdict through their Foreman report as follows:

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

No. 3723.

BOQUILLAS LAND AND CATTLE COMPANY, a Corporation, Plaintiff,
vs.
THE ST. DAVID CO-OPERATIVE COMMERCIAL AND DEVELOPMENT ASSOCIATION, a Corporation, Defendants.

We the jury, duly impannelled in the above entitled cause upon our oaths do find the answers to the questions submitted to us herein as indicated by the within answers to the questions attached hereto.

G. H. McKINZIE, *Foreman.*

1. Did the St. David Co-operative Commercial Developing, or the St. Davis Canal Company, John Merrill, J. N. Curtis Samuel Curtis John Summers, named as defendants, or any of them go upon the premises of the plaintiff about the month of December 1904 and attempt to build a dam and to construct a ditch or canal, and divert the water from the San Pedro River?

79 Plaintiff. Yes.

GEO. H. McKINZIE, *Foreman.*

2. If part of the defendants went upon the premises for the purpose, who of the defendants was it that thus went there for that purpose?
Plaintiff. Yes.

GEO. H. McKINZIE, *Foreman.*

3. And if the defendants all of them went there for that purpose, was it their purpose, to build a dam and build a canal or ditch, or was it to build a dam in the place formerly occupied by an old dam, repair the canal or ditch that had already been constructed and was there existing?
Plaintiff. Construct new dam.

GE. H. McKINZIE, *Foreman.*

4. Did the defendants or their predecessors in interest in the year 1877 erect a dam across the San Pedro River at the point named in the pleadings, and construct a ditch therefrom known as the Mason & Cable ditch, since known as the Hill ditch or Union Asequia?
Defendant. Yes.

GEO. H. McKINZIE, *Foreman.*

5. If the predecessors or grantors in interest of the defendants did not construct said dam and ditch and did not construct it in 1877, when did they build the dam and construct such ditch?
Defendant. Yes.

GEO. H. McKINZIE, *Foreman.*

6. If the defendants or their predecessors or grantors in interest did not openly, adversely and peac-ably use the dam and ditch, and the waters that flowed therein adversely and peac-ably ever since the year 1877 up to the present time, what year if any since
80 1887 up to the present time have they thus used it?
Defendant. Yes.

GEO. H. McKENZIE, *Foreman.*

7. Did John Summers cultivate by the waters from the Hill ditch any land other than the land on the Boquillas land grant and if so when and how many acres?
Defendant. Yes.

GEO. H. McKENZIE, *Foreman.*

8. Did J. N. Curtis irrigate from waters of the Hill ditch any lands not on the grant, and if so, how many acres?
Defendant. Yes.

GEO. H. McKENZIE, *Foreman.*

9. Did Lyman Curtis irrigate from the waters of the Hill ditch any lands not on the said grant, and if so when and how many acres?
Defendant. Yes.

GEO. H. McKENZIE, *Foreman.*

10. Did any other person other than John Summers, J. N. Curtis, S. B. Curtis and Lyman Curtis irrigate from the waters of the said Hill ditch any land not on the Boquillas Grant and if so for what length of time, who were the persons who thus irrigated the land, and how many acres did each one irrigate?

Defendant. Yes.

G. H. McKENZIE, *Foreman.*

11. Did the Hill ditch at any time have any extension or ditch connecting it with the ditch of the St. David Canal Company?

Plaintiff. No Ditch.

G. H. McKENZIE, *Foreman.*

12. Did the defendants or their predecessors in interest
81 divert the waters into the Hill ditch, and use the same for irrigation and domestic purposes peac-ably and adversely prior to the date of the commencement of this action, and if so when was such diversion and appropriation and adverse use made, and how long did it continue?

Defendant. Yes.

GEO. H. McKENZIE, *Foreman.*

The following jurors claim that the answer to the third question is not correct: R. Joyce; J. H. Beare; Nelson Stevenson; Walter Dority. (for further information see their original ballot attached to verdict.) And said jury being interrogated by the Court say that this is their verdict and so say they all. Whereupon it is by the Court ordered that the parties hereto file briefs within thirty days. It is further ordered by the Court that the jury in the above case be and they are hereby excused from further consideration of this case and they are hereby excused for the term.

October Term, A. D. 1905.

SATURDAY, *March 24th*, 1905.

Title of Court.

3723.

BOQUILLAS LAND & CATTLE COMPANY, Plaintiff,

vs.

THE ST. DAVID DEVELOPMENT AND IMPROVEMENT CO., Defendant.

Judgment Order.

This cause having been heretofore tried and submitted on briefs and the Court having been fully advised in the premises and now
82 all parties hereto being represented in Court by their counsel, it is by the Court ordered that judgment be entered herein in favor of the plaintiff and against the defendants (except J. N. Curtis, Lyman Curtis and John Summers) for their costs.

October Term, A. D. 1905.

SATURDAY, *April 21st*, 1905.

Title of Court.

3723.

BOQUILLAS LAND & CATTLE CO., a Corporation, Plaintiff,
vs.
THE ST. DAVID CO-OPERATIVE AND DEVELOPMENT CO. ASS'N ET AL., Defendants.

This cause having been heretofore tried by this Court, before a jury, and taken under advisement and the same having been fully considered, it is by the Court ordered that judgment be entered herein in favor of the plaintiffs and against the defendants, The St. David Co-operative Development Co. Ass'n. It is further ordered that judgment be entered herein against the plaintiffs and in favor of defendants J. N. Curtis, Sam Curtis, Lyman Curtis and John Summers in accordance with the findings filed herein. The plaintiffs present their motion for a new trial which is by the Court overruled and denied, whereupon the plaintiffs give notice of appeal in open Court to the Supreme Court of Arizona, from the judgment and from the order denying plaintiff's motion for a new trial. Come now the defendants and present their motion for a new trial which is by the Court overruled and denied, whereupon the defendants, the St. David Co-operative Commercial & Development Association and the St. Davis Canal Company give notice in open court of appeal to the Supreme Court of Arizona.

FLETCHER M. DOAN, *Judge*.

83 *Judgment.*

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

BOQUILLAS LAND & CATTLE COMPANY, a Corporation, Plaintiff,
vs.
THE ST. DAVID CO-OPERATIVE COMMERCIAL & DEVELOPMENT ASSOCIATION, a Corporation; THE ST. DAVID CANAL COMPANY, a Corporation; JOHN MERRILL, J. N. CURTIS, SAMUEL CURTIS, JOHN SUMMERS, JOHN DOE, and RICHARD ROE, Whose Names Are Unknown, Defendants.

Judgment.

This action having come on for trial at the City of Tombstone, before the Honorable Fletcher M. Doan, with a jury, and certain questions having been framed for submission to the jury to receive their answers thereupon as advisory to the court, and the plaintiff having offered evidence in support of the allegations of the com-

plaint, and the defendants having offered evidence in support of the issues raised by their answer and in support of the affirmative allegations, and new matter in their answers set forth and the plaintiff having offered evidence in rebuttal, and the case having been submitted, the said jury having rendered its verdict and having answered the various questions propounded, which verdict was duly filed with the Clerk of the Court, and the Court having been advised by the said verdict, and after due deliberation having rendered and filed its decision separately stating the facts found and the conclusions
84 of law, now upon motion of Eugene S. Ives, attorney for the plaintiff, it is

Ordered adjudged and decreed.

1. That the plaintiff is the owner in fee and entitled to the exclusive possession of that certain tract of land situate in the County of Cochise, Territory of Arizona, known and designated as the Rancho San Juan de las Boquillas y Nogales the same being

A strip of land two and one-fourth (2¼) miles in width lying along, and extending to a distance of one and one-eight- (1⅛) miles on each side of the San Pedro River, said strip beginning at a point on said river about seven (7) miles above (south of) the town of Fairbanks in said County of Cochise and extending thence down, along and each side of said river as aforesaid, for a distance of about fourteen and one-half (14½) miles to a point on said river about seven and one-half (7½) miles below (north of) said town of Fairbanks.

2. The defendants the St. David Co-operative Commercial & Development Association, The St. David Canal Company, John Merrill, John Doe and Richard Roe, except Lyman Curtis, have no right, title or interest in and to that certain dam constructed across the San Pedro River at a point about 1½ miles below and north of the town of Fairbank, and have no right, title or interest in and to that certain ditch constructed from about the point where said dam was constructed over and across the lands and premises of the plaintiff, the said dam and ditch being commonly known under the two names Union Canal and Hill Canal, and the said defendants have no right to the use of the said ditch or to any easement over the lands of the plaintiff traversed by said ditch for the diversion or carriage
85 through said ditch of *of* any waters out of said river.

3. The defendant J. N. Curtis, is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 40/380 of the water which would flow through a ditch of the same size and grade of the said ditch first constructed as aforesaid and delivering the same for the use upon the said 40 acres of land of J. N. Curtis lying immediately north of the northern boundary of the said grant.

4. The defendant Lyman Curtis, sued as John Doe, in this action, in entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 20/380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed as aforesaid, and delivering the same for use upon the said 20 acres of land of the said Lyman Curtis lying immediately east of

and about 200 yards from the said last mentioned land of the said J. N. Curtis.

5. The defendant Samuel Curtis is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 20/380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed as aforesaid, and delivering the same for use upon the said 20 acres of land of the said Samuel Curtis, lying eastwardly and near the said last mentioned land of the said J. N. Curtis.

6. The defendant John Summers is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 40/380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed as aforesaid, and delivering the same for use upon the 40 acres of land of the said John Summers lying about ½ mile north of the said land of the
86 said J. N. Curtis.

7. The said last mentioned defendants, J. N. Curtis, Lyman Curtis, Sam Curtis and John Summers have a right, title and interest in and to, and a right of way over, and an easement over and upon the lands of the plaintiff for the purpose of building a dam and a ditch or canal not over six feet wide at the bottom and three feet deep, and the said defendants and the plaintiff each have the right to convey for delivery and use upon their said land a proportionate part of the water flowing through the said ditch, in the ratio of their respective acreages as hereinbefore found, provided, however, that neither the plaintiff nor any one of the said defendants shall have the right to the carriage of said water through the said ditch or to the delivery through said ditch for use any of the waters flowing through the same unless such plaintiff or defendant shall have contributed his proportionate share to the construction and maintenance of said canal, dam and ditch, or shall pay to the parties hereto who may construct and maintain said dam and ditch a reasonable and satisfactory charge for the carriage and delivery of the said water.

8. That the defendants the St. David Co-operative Commercial & Development Association, The St. David Canal Company, John Merrill, John Doe and Richard Roe, except Lyman Curtis, be and each of them is perpetually enjoined and restrained from entering upon the lands of plaintiff for any purpose whatever and from building a canal or ditch or dam over the lands of the plaintiff at any place or places except that the said defendants are not enjoined from entering upon the said lands of the plaintiff and maintaining and con-
87 structing a dam, ditch, or canal at a certain point about one mile south of the northern boundary of the land grant known and designated as the Rancho San Juan de las Boquillas y Nogales the rights of the plaintiff and of the defendants with respect to the building a dam, canal or ditch from said point northerly through the lands of the plaintiff not being considered or adjudicated herein.

9. That the plaintiff recover of the defendant, The St. David Canal Company $— its costs; that the defendant Lyman Curtis, sued as John Doe, recover of the plaintiff $— his costs; that the defendant

Sam Curtis recover of the plaintiff $— his costs; and that the defendant J. N. Curtis recover of the plaintiff $— his costs.

(Signed) FLETCHER M. DOAN, *Judge*.

Endorsed: 3723. District Ct. Cochise Co. Boquillas Land & Cattle Co., Plaintiff, *vs.* The St. David Co-operative Commercial & Development Ass'n *et al.*, Defendants. Judgment. Filed Nov. 2" 1906 5 o'clock P. M. as of April 21" 1906. Geo. B. Wilcox, Clerk.

88 *Petition for Writ of Error.*

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

BOQUILLAS LAND AND CATTLE COMPANY, a Corporation, Plaintiff in Error,

vs.

THE ST. DAVID CO-OPERATIVE COMMERCIAL & DEVELOPMENT ASSOCIATION, a Corporation; THE ST. DAVID CANAL COMPANY, a Corporation; JOHN MERRILL, J. N. CURTIS, SAMUEL CURTIS, JOHN SUMMERS, JOHN DOE, and RICHARD ROE, Whose Names Are Unknown, Defendants in Error.

To the Clerk of the District Court of the Second Judicial District in and for the County of Cochise:

Now comes the Boquillas Land & Cattle Company, a corporation, the above named plaintiff in error, and petitions that a writ of error be allowed, and alleges and avers:

I.

The plaintiff is a corporation organized under the laws of the state of California, with its principal place of business in the City of San Francisco, in said State, and is duly authorized to hold property, real and personal, to transact business in the Territory of Arizona, county of Cochise; that the defendants, The St. David Co-operative Commercial & Development Association, a corporation, and the St. David Canal Company, a corporation, are corporations organized under the laws of the Territory of Arizona with their principal respective places — business in the county of Cochise, in said
89 Territory; that the defendants, John Merrill, J. N. Curtis, Samuel Curtis, John Summers and Lyman Curtis, sued as John Doe, reside in the county of Cochise in the said Territory.

II.

That heretofore, and on the — day of ——, 19—, an action was commenced in the above named district court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, wherein the above named defendants in error were defendants.

That the said action came on for trial before the Honorable Fletcher M. Doan, sitting at Tombstone, in the said county of Co-

chise, with a jury, and that certain special issues were framed and submitted to the said jury, and the jury did on or about the — day of November, 1905, bring in its verdict upon the said issues, and that the said court did render judgment and make its decision in writing, wherein its findings of fact and conclusions of law were stated separately and that on the 2nd day of November, 1906, judgment was duly entered in the said action in accordance with the said decision as aforesaid, by which said judgment it was ordered, adjudged and decreed as follows, to-wit:

Ordered adjudged and decreed

1. That the plaintiff is the owner in fee and entitled to the exclusive possession of that certain tract of land situate in the County of Cochise, Territory of Arizona, known and designated as the Rancho San Juan de las Boquillas y Nogales the same being

A strip of land two and one-fourth (2¼) miles in width lying along and extending to a distance of one and one-eighth
90 (1⅛) miles on each side of the San Pedro River, said strip beginning at a point on said river about seven (7) miles above (south of) the town of Fairbank in said county of Cochise and extending thence down, along and each side of said river as aforesaid, for a distance of about fourteen and one-half (14½) miles to a point on said river about seven and one-half (7½) miles below (north of) said town of Fairbank.

2. The defendants the St. David Co-operative Commercial & Development Association, The St. David Canal Company, John Merrill, John Doe and Richard Roe, except Lyman Curtis, have no right, title or interest in and to that certain dam constructed across the San Pedro River at a point about 1½ miles below and north of the town of Fairbank, and have no right, title or interest in or to that certain ditch constructed from about the point where said dam was constructed over and across the lands and premises of the plaintiff, the said dam and ditch being commonly known under the *the* two names Union Canal and Hill Canal, and the said defendants have no right to the use of the said ditch or to any easement over the lands of the plaintiff traversed by said ditch for the diversion or carriage through said ditch of any waters out of the said river.

3. The defendant, J. N. Curtis is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 40/380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed as aforesaid and delivering the same for use upon the said 40 acres of land of J. N. Curtis lying immediately north of the northern boundary of the said grant.

4. The defendant Lyman Curtis, sued as John Doe in this
91 action, is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 20/380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed as aforesaid, and delivering the same for use upon the said 20 acres of land of the said Lyman Curtis

lying immediately east of and about 200 yards from the said last mentioned land of the said J. N. Curtis.

5. The defendant Samuel Curtis is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 20/380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed as aforesaid, and delivering the same for use upon the said 20 acres of land of the said Samuel Curtis, lying eastwardly and near the said last mentioned land of the said J. N. Curtis.

6. The defendant John Summers is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 40/380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed as aforesaid, and delivering the same for use upon the 40 acres of land of the said John Summers lying about ½ mile north of the said land of the said J. N. Curtis.

7. The said last mentioned defendants, to-wit: J. N. Curtis, Lyman Curtis, Sam Curtis and John Summers have a right title and interest in and to, and a right of way over, and an easement over and upon the lands of the plaintiff for the purpose of building a dam and a ditch or canal not over six feet wide at the bottom and three feet deep, and the said defendants and the plaintiff each have the right to convey for delivery and use upon their said land a proportionate part of the water flowing through the
92 said ditch, in ratio of their respective acreages as hereinbefore found, provided, however, that neither the plaintiff nor any one of the said defendants shall have the right to the carriage of said water through the said ditch or to the delivery through said ditch for use any of the waters flowing th-ough the same unless such plaintiff or defendant shall have contributed his proportionate share to the construction and maintenance of said canal, dam and ditch, or shall pay to the parties hereto who may construct and maintain said dam and ditch a reasonable and satisfactory charge for the carriage and delivery of the said water.

8. The defendants the St. David Co-operative Commercial & Development Association, The St. David Canal Company, John Merrill, John Doe and Richard Roe, except Lyman Curtis, be and each of them is perpetually enjoined and restrained from entering upon the lands of the plaintiff for any purpose whatever and from building a canal or ditch or dam over the lands of the plaintiff at any place or places except that the said defendants are not enjoined from entering upon the said lands of the plaintiff and maintaining and constructing a dam, ditch or canal at a certain point about one mile south of the northern boundary of the land grant designated as the Rancho San Juan de las Boquillas y Nogales the rights of the plaintiff and of the defendants with respect to the building and operating a dam, canal or ditch from said point northerly through the lands of the plaintiff not being considered or adjudicated herein.

9. That the plaintiff recover of the defendant, The St. David Canal Company $—, its costs; that the defendant Lyman Curtis,

sued as John Doe, recover of the plaintiff $—, his costs; that
93 the defendant Sam Curtis recover of the plaintiff $—, his costs; and that the defendant J. N. Curtis recover of the plaintiff $—, his costs.

(Signed) FLETCHER M. DOAN, *Judge.*

III.

That your petitioner desires to remove the said judgment to the Supreme Court of the Territory for revision and correction.

Wherefore, your petitioner asks that you, the clerk of the said court aforesaid, do forthwith issue a summons in accordance with law for the said defendants in error and each of them, describing the said judgment and stating that the writ of error petitioned for has been granted, and requiring the defendants in error and each of them to appear and defend said writ before the supreme court of the Territory of Arizona, at the next term thereof, to be held at the city of Phœnix on the second Monday of January, 1907.

BOQUILLAS LAND & CATTLE CO.,
Per EUGENE S. IVES, *Att'y.*

Endorsed: 3723. District Ct. Cochise Co. Boquillas Land & Cattle Co., Plaintiff, *vs.* The St. David Co-operative Commercial & Development Ass'n *et al.*, Defendants. Petition for Writ of
94 Error. Filed Nov. 2" 1906. 5:15 P. M. Geo. B. Wilcox, Clerk.

Bond.

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

Boquillas Land & Cattle Company, a Corporation, Plaintiff in Error,

vs.

The St. David Co-operative Commercial & Development Association, a Corporation; The St. David Canal Company, a Corporation; John Merrill, J. N. Curtis, Samuel Curtis, John Summers, John Doe, and Richard Roe, Whose Names are Unknown, Defendants in Error.

Know all men by these presents: That the Boquillas Land & Cattle Company, a corporation, the above named plaintiff in error, as principal, and W. C. Land residing in the city of Tucson, Territory of Arizona, and H. W. Etz, residing in the city of Tucson, Territory of Arizona, sureties, are jointly and severally held and firmly bound to the St. David Co-operative Commercial & Development Association, a corporation, The St. David Canal Company, a corporation, John Merrill, J. N. Curtis, Samuel Curtis, John Sum-
95 mers, John Doe and Richard Roe, the above named defendants in error, and each of them, in the sum of Five Hundred

Dollars ($500.) for which said sum the above named obligors do bind themselves, their heirs, executors and administrators.

The condition of the above bond is such that

Whereas, the above named obligor, the Boquillas Land & Cattle Company has sued out a writ of error from a certain judgment rendered in the above entitled action, which said judgment was entered on the — day of ——, 1905.

Now, therefore, if the above named plaintiff in error shall prosecute said writ of error with effect, and shall pay all costs which have accrued in the district court or which may accrue in the supreme court of the Territory, then this obligation to be void; otherwise to remain in full force and effect.

In witness whereof the parties hereto have signed these presents at the city of Tucson, this -- day of November, 1906.

BOQUILLAS LAND & CATTLE CO.,
By HENRY K. STREET, *Manager.*
W. C. LAND.
H. W. ETZ.

TERRITORY OF ARIZONA, *County of Pima, ss:*

W. C. Land and H. W. Etz whose names are subscribed as sureties to the within bond, being severally sworn, each for himself, deposes and says: that he is a resident and freeholder within the Territory of Arizona; that he is worth the sum of Five Hundred Dollars over and above all his just debts and liabilities, and over and above all property exempt from execution and forced sale.

96 W. C. LAND.
H. W. ETZ.

Subscribed and sworn to before me this 2nd day of November, 1906.

My Commission expires Dec. 22 1908.

[SEAL.] HARRY D. CHESSELDINE,
Notary Public.

Endorsed: 3723. District Court Cochise Co. Boquillas Land & Cattle Co., Plaintiff in Error, *vs.* The St. David Co-operative Commercial & Development Ass'n, *et al.*, Defendants in Error. Bond. Approved and Filed Nov 2nd 1906. 5:85 O. Geo. B. Wilcox, Clerk.

97 *Memorandum of Costs.*

BOQUILLAS LAND AND CATTLE COMPANY, Plaintiff in Error,
vs.
THE ST. DAVID CO-OPERATIVE COMMERCIAL & DEVELOPMENT ASSOCIATION ET AL., Defendants in Error.

	DR.	CR.
Plaintiff's Clerk's costs	$45.50	$10.00
Defendant's Clerk's Costs	6.95	.....
Totals	$52.45	$10.00

TERRITORY OF ARIZONA, *County of Cochise, ss:*

I, Geo. B. Wilcox, Clerk of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, Do hereby certify that the foregoing is a full, true and correct copy (including Notice of Appeal); Judgment; Petition for Writ of Error; Bond on Appeal and Memorandum of Costs, in the case wherein the Boquillas Land & Cattle Company, a corporation is Plaintiff in Error, and The St. David Co-operative Commercial & Development Association, a corporation, *et al.*, are Defendants in Error, being No. 3723, and that the above and foregoing to-
98 gether with the original files in the case, constitute the complete record on appeal.

In witness whereof I have hereunto set my hand and affixed the seal of said Court hereto, at Tombstone, in said County and Territory, this 12th day of November, A. D. 1906.

[SEAL.]

GEO. B. WILCOX,
Clerk of Said Court,
By PHILO WILCOX,
Deputy Clerk.

(Endorsed:) No. 3723. In the District Court Second Judicial District County of Cochise Territory of Arizona. Boquillas Land & Cattle Co. Plaintiff in Error *vs.* The St. David Co-operative Commercial & Dev. Ass'n *et al.*, Defendants in Error. Record on Appeal. No. 988. Supreme Court, Territory of Arizona. Boquillas L. & C. Co. *vs.* St. David, Co-op. Com. & Dev. Ass'n *et al.* Record on Appeal. Filed Nov. 23, 1906. S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

99 In the Supreme Court of the Territory of Arizona.

No. 988.

THE BOQUILLAS LAND AND CATTLE COMPANY, a Corporation, Plaintiff in Error,

vs.

J. N. CURTIS ET AL., Defendants in Error.

Error to District Court, Cochise County.

Before Mr. Justice Doan.

Eugene S. Ives, for plaintiff in error.
Pickett & Bowman, and Ben Goodrich, for defendants in error.

Opinion by Sloan, J.

The plaintiff in error is the owner of a tract of land in Cochise County granted by the Republic of Mexico to Ignacio Gonzales and Nepomeceno Felix in the year 1833. The title to this tract of land

was confirmed to the predecessors in interest of the plaintiff in error and successors in interest to the original grantees, by the court of Private Land Claims and under the judgment of confirmance of said Land Court the patent of the United States issued to the predecessors in interest of the plaintiff in error in December 1900. The San Pedro river runs through the land in a northerly direction. In 1877 the defendants in error, and certain other persons, entered upon the land of the plaintiff in error, constructed a dam across the San Pedro river and diverted the water therefrom by means of a canal
100 over and through portions of said land. The land irrigated by means of said canal in part constituted a portion of said land; the remainder, consisting of one hundred and twenty acres, lying north of the northern boundary of the land grant, is owned by the defendants in error.

In the month of December, 1904, the defendants in error undertook to construct a new dam in place of the old one which had been destroyed by a flood, and to rebuild portions of the ditch upon the land of plaintiff in error. No use of the water appropriated and taken from the San Pedro river by the defendants in error had been made by the plaintiff in error or its predecessors in interest prior to 1877. The latter began this action to restrain the defendants in error from entering upon its land for the purpose of constructing said dam and ditch and from diverting water from the San Pedro river off of the said lands. After a trial on the merits the Court below gave judgment for the defendants in error. This judgment is attacked by the plaintiff in error upon the ground that the Court, in recognizing the right of prior appropriation in the defendants in error, erred for two reasons:

First, that by certain legislation of the Territory of Arizona the common law doctrine of riparian rights was at one time in force during the ownership of the land by the predecessors in interest of the plaintiff in error and that such rights having once attached could not be taken away by subsequent legislation

Second, that the plaintiff in error claiming title under a Mexican land grant, subsequently confirmed, possesses all the right to
101 the use of the water flowing through its land which its predecessors in interest had prior to the cession of that part of the Territory lying south of the Gila river under the Gadsden Purchase, and that the doctrine of appropriation or priority of right by virtue of priority of appropriation was not in force under the laws of Mexico at the time of the cession.

The questions thus presented are historical as well as legal and are of great interest. We will consider them in the order stated.

As is well known, after the treaty of Guadalupe Hidalgo and the organization of the Territory of New Mexico and the subsequent cession under the Gadsden Purchase, the territory included within the present boundaries of Arizona constituted a part of New Mexico. The act of Congress creating the Territory of Arizona continued in force the statutes of New Mexico until the Legislature of the new Territory should adopt its own laws. The first legislature of the new Territory met in 1864. It adopted, among its first acts, what is historically known as the Howell Code. One of the provisions of the Howell Code read as follows:

"The common law of England so far as it is not repugnant to or inconsistent with the Constitution and laws of the United States or the bill of rights or the laws of this Territory, is hereby adopted and shall be the rule of decision in the courts of this Territory."

A section of the bill of rights referred to read as follows:

"All streams, lakes and ponds of water capable of being used for the purpose of navigation or irrigation, are hereby declared to be public property, and no individual or corporation shall have the right to appropriate them exclusively to their own private use, except under such equitable regulations and restrictions as the legislature shall provide for that purpose.

102 Article 22, Bill of Rights, Howell Code.

Chapter 55 of the Howell Code contained the following provisions:

"All rivers, creeks and streams of running water in the Territory of Arizona are hereby declared public, and applicable to the purposes of irrigation and mining, as hereinafter provided."

"All rights in acequias, or irrigating canals, heretofore established shall not be disturbed, nor shall the course of such acequias be changed without the consent of such established rights."

"All the inhabitants of this Territory, who own or possess arable and irrigable lands, shall have the right to construct public or private acequias (canals), and obtain the necessary water for the same from any convenient river, creek or stream of running water."

"Whenever such public or private acequias (canals) shall necessarily run through the lands of any private individuals not benefitted by said acequias, the damages resulting to such private individuals, on the application of the party interested, shall be assessed by the probate judge of the proper county in a summary manner."

"No inhabitant of this Territory shall have the right to erect any dam, or build a mill, or place any machinery, or open any sluice, or make any dyke, except such as are used for mining purposes of the reduction of metals, as provided for in Sections six and seven of this chapter, that may impede or obstruct the irrigation of any lands or fields, as the right to irrigate the fields and arable lands shall be preferable to all others; and the justices of the peace of the respective precincts shall hear and determine the questions relative to all such obstructions in a summary manner, and cause the removal of the same by order directed to the constable of the precinct or sheriff of the county, who shall proceed to execute the same without delay."

"When any ditch or acequia shall be taken out for agricultural purposes, the person or persons so taking out such ditch or acequia shall have the exclusive right to the water, or so much thereof as shall be necessary for said purposes, and if at any time the water so required shall be taken for mining operations, the person or persons owning said water shall be entitled to damages, to be assessed in the manner provided in section six of this chapter."

"During years when a scarcity of water shall exist, owners of fields shall have precedence of the water for irrigation, according
103 to the dates of their respective titles or their occupation of the lands, either by themselves or their grantors. The oldest titles shall have precedence always."

"The regulations of acequias, which have been worked according to the laws and customs of Sonora and the usages of the people of Arizona, shall remain as they were made and used up to this day, and the provisions of this chapter shall be enforced and observed from the day of its publication."

The laws of New Mexico contained similar provisions on the subject of water and in fact little or no change thereof was made or attempted by the Howell Code.

It is contended by counsel for plaintiff in error that neither the bill of rights nor the statutes above quoted are to be construed as repugnant to or inconsistent with the doctrine of riparian rights as recognized by the common law of England.

In Clough *vs.* Wing, 2nd Arizona, 371, this court, speaking by Mr. Justice Barnes, said:

"Up to about a third of a century ago and but recently before this enactment," referring to the Howell Code, "the Territory of Arizona had been subject to the laws and customs of Mexico and the common law had been unknown; and that law has never been and is not now suited to conditions that exist here so far as the same applies to the uses of water."

This decision has stood unchallenged for nearly twenty years. A review of the subject satisfies us that the view taken and expressed by Mr. Justice Barnes was sound. Both the bill of rights and the statutes quoted declare the water of streams capable of being used for the purpose of irrigation to be public property, and conferred upon any inhabitant of the Territory who owned or possessed arable or irrigable land the right to construct ditches and obtain and divert thereby water necessary for such use from "any convenient
104 river, creek or stream of running water." The common law recognized no such right, on the contrary the riparian owner was entitled to the full flow of the stream through his land, except as the flow might be affected by a reasonable use made thereof by other riparian owners. No one except the riparian owner had the right to divert any of the water from such stream.

The statutes referred to make no distinction between the riparian owner and the owner of other land capable of being irrigated although not crossed by or adjoining the stream. Other provisions of the statutes quoted are equally repugnant to the common law doctrine of riparian rights.

As stated by the Supreme Court of Utah in Stowell *vs.* Johnson, 26 Pac. 290.

"At common law the riparian proprietor is entitled to have the water flowing, in quantity and quality, past his land as it was wont to do when he acquired title thereto, and this right is utterly irreconcilable with the use of water for irrigation."

Similar declarations have been made by the Supreme Courts of Colorado, Nevada and Wyoming.

Coffin *vs.* Left Hand Ditch Co. 6 Colo. 443.
Jones *vs.* Adams, 19 Nev. 79.
Works *vs.* Stevenson, 20 Nev. 269.
Willey *vs.* Decker, 73 Pac. 211.

Even in those states where the common law doctrine of riparian rights is applied the impossibility of reconciling the common law with the right of appropriation is recognized.

Lux *vs.* Haggin, 10 Pac. (Cal) 675.

In the latter case the Court say:

"The doctrine of appropriation, so called, is not the doctrine of the common law."

105 The statutes of Nevada adopted the common law of England in the following words:

"The common law of England, so far as it is not repugnant to or in conflict with the Constitution and Laws of the United States, or the Constitution and Laws of this State, shall be the rule of decision in all the courts of this State."

The Supreme Court of Nevada in Reno Smelting, etc. Company *vs.* Stevenson, 20 Nev. 269, construing this statute in its application to riparian rights said:

"The statute is silent upon the subject of the applicability of the common law, and we think the term 'common law of England' was implied in the sense in which it is generally understood in this country, and that the intention of the legislature was to adopt only so much of it as was applicable to our condition. An examination of the authorities will render this apparent."

It is true as pointed out by plaintiff in error that the legislature in 1885 amended the provision of the Howell Code adopting the common law as follows:

"The common law of England so far only as it is consistent with and adapted to the natural and physical condition of this Territory, and the necessities of the people thereof, and not repugnant to or inconsistent with the constitution of the United States, or bill of rights, or laws of this Territory or established customs of the people of the Territory is hereby adopted and shall be the rule of decision in all the courts of this Territory."

It is further pointed out that by the revision of 1887 the common law doctrine of riparian rights was in terms abolished in the following language:

"The common law doctrine of riparian water rights shall not obtain or be of any force or effect in this Territory."

If the legislative intent had been, prior thereto, in doubt, these provisions of the statute, under the rule applicable to the construction of statutes, would have weight and possibly controlling

106 weight on the side of the view that the common law doctrine of riparian rights had heretofore been recognized. The conflict between the legislation of the Territory prior to 1885 and the common law with respect to riparian rights appears to us to be so sharp and well defined that the legislature may not, notwithstanding the amendments referred to, be presumed to have recognized thereby the common law as theretofore applying in the Territory.

Whether or not the applicability of the common law to the physical conditions which prevail in the Territory should enter into the construction to be given the statute and whether or not the subsequent legislation can be construed as a recognition that the common

law as to riparian rights was adopted by the statutes of 1864 adopting the common law, we think a reading of the latter makes it clear that any right granted by the statute was not intended to become property in such a sense that it might not be abrogated by future legislation. The limitation expressed in the act cannot be construed as referring solely to the laws of the United States or of the Territory in force at the time of the adoption of the statute. As we have said, prior to 1864 the common law was not in force within this Territory or in New Mexico.

Trambley *vs.* Luterman, 27 Pac- (N. M.) 312.

The Supreme Court of the United States in the case of United States *vs.* Rio Grande Irrigation Company, 174, U. S. 702, said:

"The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream * * *. While this is undoubted, and the rule obtains in those states in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion
107 a State may change this common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise. Whether this power to change the common law rule and permit any specific and separate appropriation of the waters of the stream belongs also to the legislature of a Territory, we do not deem it necessary, for the purposes of this case, to inquire. We concede arguendo that it does."

If the legislature of the Territory may confer riparian rights by statute, it seems to us clear that it may do so upon the condition that such rights thus conferred may subsequently be modified or abrogated. Where the legislature has, subject to future legislation, conferred riparian rights to the use of water from flowing streams upon riparian owners, the latter cannot be said to be vested in such a sense as that they may not be subsequently abrogated by statute, at any rate when the riparian owner has made no use of the water permitted him at common law.

It is conceded that no use of the water of the San Pedro river was made by any predecessor in interest of plaintiff in error between 1864 and 1887.

If, therefore, the statute of 1864 conferred riparian rights as recognized at common law upon the predecessors in interest of the plaintiff in error and this grant was limited by the condition that they might be, by future legislation, abrogated, it follows that in the case at bar such rights as may have been conferred by said statute were abrogated by the statute of 1887.

The contention of the plaintiff in error that under the treaty of Guadalupe Hidalgo the owner of a Mexican grant, title to which had vested at the date of the treaty, retained all vested rights of
108 property to which he was entitled under the laws of Mexico is undoubtedly sound. The legislature of Arizona has no power or authority to deprive any such owner of any such rights, at least without due compensation. The plaintiff in error is the owner of such a grant. It remains to be determined, therefore, what,

under the laws of Mexico prior to 1854, were the rights of an owner of land within the Gadsden Purchase to the water of a stream flowing through his land.

Counsel for plaintiff in error asserts in his brief that these rights were substantially those of a riparian owner at common law. In support of this assertion he cites the celebrated case of Lux *vs.* Haggin, *supra.*

We have carefully considered this case in its bearing upon this question and have reached the conclusion that the learned Court, in reviewing the subject in the light of the authorities upon Spanish and Mexican law available to it did not define with certainty the rights of a riparian owner of land in California prior to the cession. The Court laid down as its general conclusion that,

"By the law of Mexico the running waters of California were not dedicated to the common use of all the inhabitants in such sense that they could not be deprived of the common use."

This general declaration is construed by the Court subsequently in its opinion as follows:

"The waters of innavigable rivers, while they continued such, were subject to the common use of all who could legally gain access to them for the purposes necessary to the support of life. But the Mexican government possessed the power of retaining the waters in their natural channel, or of conceding the exclusive use of portions of them to individuals or corporations, upon such terms or conditions, and with such limitations, as it saw fit to establish by law."

109 Here it seems to us is a clear declaration, assuming it to correctly state the Mexican law, that the use to which the waters of an innavigable river or stream might be put was the subject of legislative control. If the legislature, therefore, could concede to individuals or corporations exclusive right to the use of the water of innavigable streams, we are unable to see how riparian rights, in the nature of those recognized at common law, could possibly exist under the Spanish law for, as we have seen, the essential feature of the common law doctrine was its denial of the right of exclusive use by even the riparian owner. If, under the Mexican law, the use of waters of innavigable streams was under legislative control, the change of sovereignty operated merely to transfer this right of control from Mexico to the government of the United States. This being so it must follow that the owner of the land grant, with the change of sovereignty, stood in exactly the same position as before with relation to the right of the sovereignty to grant the exclusive use of waters of any innavigable stream, flowing through or adjoining the grant, to whomsoever it might choose. The United States, or its delegated authority, the Territory of Arizona, might, therefore, confer common law rights upon the riparian owner or might establish the right of prior appropriation and grant this right to others than riparian owners. As we have seen, the legislatures of New Mexico and of Arizona, under their delegated authority from the sovereignty of the United States, to whom, under the doctrine

stated in Lux *vs.* Haggin, passed the right of control over innavigable waters by the treaty of cession from Mexico, have chosen
110 to deny to riparian owners exclusive rights and to confer upon others rights to the use of such water without reference to the situation of the lands owned by the latter with respect to the streams from which such water may be taken.

Whatever may have been the general law throughout the Republic of Mexico on the subject of water it is reasonably certain that in the State of Sonora the doctrine of appropriation, as now recognized, was to same extent in force by custom. In this Territory irrigation was practiced in the Santa Cruz Valley prior to the cession and it is well known the right of appropriation without regard to the riparian character of the lands was there in force probably from the time when the Spaniards first settled in the valley. Our statutes, as well as those of New Mexico, seem to have had their origin in the Mexican law as modified by custom.

To concede, therefore to the owner of the grant in question riparian rights would be in effect to concede to it what his predecessors in interest do not appear to have possessed prior to the cession under the Gadsden Purchase.

We think the Court below did not err in applying the existing law of the Territory in its decision of the questions at issue, and that its judgment and decree should be affirmed, and it is so ordered.

RICHARD E. SLOAN,
Associate Justice.

We concur:

EDWARD KENT, *C. J.*
JOHN H. CAMPBELL.

111 I concur with the reasoning and deductions in the opinion of Mr. Justice Sloan, but deem it appropriate, despite the conclusiveness of that reasoning, to state a broader ground upon which the same conclusion is inevitable. The essence of the common law is flexibility and adaptibility. It is not a body of fixed rules, but is the best product of human reason applied to the premises of the ordinary and extraordinary conditions of life as, from time to time, they are brought before tribunals. Hence, though the common law is homogeneous, yet it finds widely different expression in different jurisdictions. Should the common law become so crystallized that its expressions must take the same form wherever the common law system prevails, irrespective of physical, social, or other conditions peculiar to the locality, it would cease to be the common law of history, and would be but an inelastic and arbitrary code. The common law historically has carried with it, and as part of it, the principle that precedents—earlier deductions from known conditions—must yield to the reason of different or modified conditions. This is expressed, and analogously applied, in People *v.* Appraisers, 33 N. Y. 461, where it is said: "No doctrine is better settled than "that such portions of the law of England as are not adapted to our "condition form no part of the law of this state. This exception

"includes, not only such laws as are inconsistent with the spirit "of our institutions, but such as were framed with special reference "to the physical condition of a country differing widely from our "own. *It is contrary to the spirit of the common law itself* to apply "a rule founded on a particular reason to a case where that reason "utterly fails." In Arizona, neither prior to its acquisi-
112 tion from Mexican or since has the doctrine of riparian rights had practical application or recognition; great property rights have become established upon a different theory; the physical conditions and the demands of agriculture and mining are utterly inconsistent with its applicability; it would be entirely destructive of an agricultural system, which, though now great and of immense value, is but on the threshhold of its development. This precise point has been considered and adjudicated by the Supreme Court of Nevada in Reno &c. Works *v.* Stevenson, 20 Nev. 269, 21 Pac. 317. The principle I invoke has found varied and frequent application. Numerous illustrations are collected in 8 Cyc. 380. It was applied by the Supreme Court of the United States in Jones *v.* Clifton, 101 U. S. 225, quoted with approval in Luhrs *v.* Hancock, 181 U. S. 571.

Without further elaboration of my reasons, I state my belief that the utter incompatibility of the doctrine of riparian rights with the conditions of life in this territory is an all-sufficient reason, under the principle of the common law itself, to hold that that doctrine is not here in force.

FREDERICK S. NAVE,
Associate Justice.

(Endorsed:) No. 988. In the Supreme Court, of the Territory of Arizona. Boquillas Land & Cattle Co. *vs.* St. David Co-operative Com. & D. Asso. *et al.* Opinion by Sloan J. Filed March 22, 1907. F. A. Tritle, Jr., Clerk.

113 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

BOQUILLAS LAND & CATTLE COMPANY, a Corporation, Plaintiff in Error,

vs.

THE ST. DAVID CO-OPERATIVE COMMERCIAL & DEVELOPMENT ASSOCIATION, a Corporation; THE ST. DAVID CANAL COMPANY, a Corporation; JOHN MERRILL, J. N. CURTIS, SAMUEL CURTIS, JOHN SUMMERS, JOHN DOE, and RICHARD ROE, Whose Names Are Unknown, Defendants in Error.

Action Brought in the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise, and the Petition for Writ of Error Filed in the said County of Cochise, in the Office of the Clerk of said District Court.

The Territory of Arizona sends greeting to The St. David Co-operative Commercial & Development Association, a corporation organized under the laws of the Territory of Arizona, with its principal place of business in Cochise County, Arizona; The St. David Canal Company, a corporation organized under the laws of the Territory of Arizona, with its principal place of business in Cochise County, Arizona; John Merrill, J. N. Curtis, Samuel Curtis, John Summers, John Doe, and Richard Roe, whose names are unknown, residing in the County of Cochise, Territory of Arizona:

You and each of you are hereby informed that the Petition in Error of the Boquillas Land & Cattle Company, a corporation organized under the laws of the State of California, with its principal place of business in San Francisco, in said State of California, has been filed in this Court, on the 2nd day of November, 1906, and that the judgment upon which said Writ of Error is predicated, is as follows:

Ordered, adjudged and decreed

1. That the plaintiff is the owner in fee and entitled to the exclusive possession of that certain tract of land situate in

114 *in* the County of Cochise, Territory of Arizona, known and designated as the Rancho San Juan de las Boquillas y Nogales the same being

A strip of land two and one-fourth (2¼) miles in width lying along, and extending to a distance of one and one-eighth (1⅛) miles on each side of the San Pedro River, said strip beginning at a point on said river about seven (7) miles above (south of) the town of Fairbank in said County of Cochise and extending thence down, along and on each side of said river as aforesaid, for a distance of about fourteen and one-half (14½) miles to a point on said river about seven and one-half (7½) miles below (north of) said town of Fairbank.

2. The defendants the St. David Co-operative Commercial & De-

velopment Association, The St. David Canal Company, John Merrill, John Doe and Richard Roe, except Lyman Curtis, have no right, title or interest in and to that certain dam constructed across the San Pedro River at a point about 1½ miles below and north of the town of Fairbank and have no right title or interest in or to that certain ditch constructed from about the point where said dam was constructed over and across the lands and premises of the plaintiff, the said dam and ditch being commonly known under the two names Union Canal and Hill Canal, and the said defendants have no rights to the use of the said ditch or to any easement over the lands of the plaintiff traversed by said ditch for the diversion or carriage through said ditch of any waters out of the said river.

3. The defendant J. N. Curtis, is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 40/380 of the water which would flow through a ditch of
115 the size and grade of the said ditch first constructed as aforesaid and delivering the same for the use upon the said 40 acres of land of J. N.. Curtis lying immediately north of the northern boundary of the said grant.

4. The defendant Lyman Curtis, sued as John Doe in this action, is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 20/380 of the water which would flow through a ditch of the same size and grade of the said ditch first constructed as aforesaid, and delivering the same for use upon the said 20 acres of land of the said Lyman Curtis lying immediately east of and about 200 yards from the said last mentioned land of the said J. N. Curtis.

5. The defendant Samuel Curtis is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 20/380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed as aforesaid, and delivering the same for use upon the said 20 acres of land of the said Samuel Curtis, lying eastwardly and near the said last mentioned land of the said J. N. Curtis.

6. The defendant John Summers is entitled to construct or aid in the construction of said dam and ditch for the purpose of conveying 40/380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed as aforesaid, and delivering the same for use upon the 40 acres of land of the said John Summers lying about ½ mile north of the said land of the said J. N. Curtis.

7. The said last mentioned defendants, to-wit, J. N. Curtis, Lyman Curtis, Sam Curtis and John Summers have a right title and interest in and to, and a right of way over, and an ease-
116 ment over and upon the lands of the plaintiff for the purpose of building a dam and a ditch or canal not over six feet wide at the bottom and three feet deep, and the said defendants and the plaintiff each have the right to convey for delivery and use upon their said land a proportionate part of the water flowing through the said ditch, in the ratio of their respective acreages as herein-fore found, provided, however, that neither the plaintiff nor

any one of the said defendants shall have the right to the carriage of said water through the said ditch or to the delivery through the said ditch for use any of the waters flowing through the same unless such plaintiff or defendant shall have contributed his proportionate share to the construction and maintenance of said canal, dam and ditch, or shall pay to the parties hereto who may construct and maintain said dam and ditch a reasonable and satisfactory charge for the carriage and delivery of the said water.

8. That the defendants the St. David Co-operative Commercial & Development Association, the St. David Canal Company, John Merrill, John Doe and Richard Roe, except Lyman Curtis, be and each of them is perpetually enjoined and restrained from entering upon the lands of the plaintiff for any purpose whatever and from building a canal or ditch or dam over the lands of the plaintiff at any place or places except that the said defendants are not enjoined from entering upon the said lands of the plaintiff and maintaining and constructing a dam, ditch or canal at a certain point about one mile south of the northern boundary of the land grant known and designated as the Rancho San Juan de las Boquillas y Nogales the rights of the plaintiff and of the defendants with respect to the building and operating a dam, canal or ditch from said point

117 northerly through the lands of the plaintiff not being considered or adjudicated herein.

9. That the plaintiff recover of the defendant, The St. David Canal Company $— its costs; that the defendant Lyman Curtis, sued as John Doe, recover of the plaintiff $— his costs that the defendant Sam Curtis recover of the said plaintiff $— his costs; and that the defendant J. N. Curtis recover of the plaintiff $— his costs.

(Signed) FLETCHER M. DOAN, *Judge.*

You and each of you are further informed that the said Writ of Error has been granted by the Court and you are therefore hereby required to appear and defend such writ before the Supreme Court of the Territory of Arizona, at the next meeting thereof.

Given under my hand and the Seal of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, this 5th day of November, A. D. 1906.

[SEAL.] GEO. B. WILCOX, *Clerk.*

118 OFFICE OF THE SHERIFF OF THE COUNTY OF COCHISE:

I hereby certify that I have received the within summons on the 6th day of November, 1906 and personally served the same on the 12th day of November, 1906 on Jno. Merrill, J. N. Curtis, Lyman Curtis, Jno. Summers being four of the defendants named in said summons, by delivering to and leaving with said defendants personally in the County of Cochise a copy of said summons and a true and correct copy of the complaint in the action named in said summons attached to said copy of summons.

Dated this 20th day of Nov. 1906.

R. S. HUNT, *Sheriff.*

By W. J. BENNETT,

Deputy Sheriff.

SHERIFF'S OFFICE, *County of Cochise, ss:*

I hereby certify that I received the within summons on the 6th day of November, 1906, and personally served the same on the 20th day of November, 1906, on The St. David Canal Company, a corporation, being one of the defendants named in said summons, by delivering to and leaving with A. J. Busby President of said Company, defendant, personally in the City of Tombstone, County of Cochise, a copy of said summons and a true and correct copy of the complaint in the action named in said summons attached to said copy of summons.

Dated, November 20th, 1906.

119 R. S. HUNT, *Sheriff.*
By C. A. WALLACE,
Deputy Sheriff.

SHERIFF'S OFFICE, *County of Cochise, ss:*

I hereby certify that I received the within summons on the 6th day of November, 1906, and personally served the same on the 19th day of November, 1906, on the St. David Co-operative, Commercial & Development Association, a corporation, being one of the defendants named in said summons, by delivering to and leaving with John Merrill, President of said Association, defendant, personally in the City of Tombstone, County of Cochise, a copy of said summons and a true and correct copy of the complaint in the action named in said summons attached to said copy of summons. Dated this 20th day of November, 1906.

R. S. HUNT, *Sheriff.*
By C. A. WALLACE,
Deputy Sheriff.

(Endorsed:) No. 3723. In the District Court Second Judicial District, County of Cochise, Territory of Arizona. Boquillas Land & Cattle Co. a corp. Plaintiff in Error, *vs.* The St. David Co-op. Com. & Dev. Ass'n. a corp. Defendant in Error. Summons. Received Nov. 6th 1906 at 2 o'clock P. M. R. S. Hunt, Sheriff. By C. A. Wallace Deputy. Filed Nov. 20th, 1906. Geo. B. Wilcox, Clerk. Philo Wilcox, Deputy. No. 988. In the Supreme Court Territory of Arizona. Boquillas Land & Cattle Co. *vs.* The St. David Co-operative Com. & Dev. Association, *et al* Summons. Filed Dec. 12, 1906. F. A. Tritle, Jr. Clerk. By Angie B. Parker, Deputy.

120 In the Supreme Court of the Territory of Arizona.

THE BOQUILLAS LAND AND CATTLE COMPANY, a Corporation, Plaintiff in Error,

vs.

J. N. CURTIS ET AL., Defendants in Error.

Motion for Rehearing.

Comes now the above named plaintiff in error, the Boquillas Land and Cattle Company, a corporation, and moves the Court for a rehearing of the above entitled cause.

This motion is made upon the following grounds, to-wit:

1. That in its decision and opinion filed herein on the 22nd day of March, 1907, this Court erred in holding and deciding that the common law doctrine of riparian rights had never been in effect in this Territory, and that the statutes quoted in said opinion and decision were inconsistent with such common-law doctrine.

2. That in said decision and opinion the Court erred in holding that the common-law doctrine of riparian rights, if it ever existed in this Territory, was subject to modification by subsequent legislation.

3. That in said decision and opinion the Court erred in holding that the doctrine of riparian rights did not apply to a Mexican land grant, claimed under a grant prior to 1854.

4. That in said decision and opinion the Court erred in holding that the doctrine of appropriation had any application to such a Mexican land grant or in any way affected the rights of the owner thereof.

5. That in said decision and opinion the Court erred in
121 holding that by the law of Mexico prior to the Gadsden treaty, the owner of riparian lands was not entitled to substantially the same riparian rights as at common law, and in holding that the doctrine of appropriation existed under such Mexican law.

6. That the Court erred in holding that the doctrine of appropriation had any application to any other than public lands at the date of said Gadsden treaty.

7. That the court erred in holding that plaintiff in error was not entitled to an injunction restraining defendants in error from entering upon its lands and diverting the waters of the San Pedro river, as prayed in its complaint.

8. That the Court erred in holding, upon the facts shown in the record in this cause, that plaintiff in error was not entitled to the relief prayed in its complaint.

Dated April 1st., 1907.

EUGENE S. IVES.
Attorney for Plaintiff in Error.

TERRITORY OF ARIZONA, *County of Pima, ss:*

S. L. Pattee being duly sworn, deposes and says; that he is a citizen of the United States, over the age of twenty-one years and resides at the City of Tucson, Pima County, Arizona; that on the 2nd day of April, 1907, at the City of Tucson, Arizona, he served the annexed motion for re-hearing upon Messrs. Pickett & Bowman, attorneys for the defendants in error therein named, by depositing in the post office at said City of Tucson, a true copy of said
122 motion, enclosed in a sealed envelope, with postage prepaid thereon and address- to Messrs. Pickett & Bowman, at Tombstone, Arizona, their place of residence.

Affiant further says that at said City of Tucson, on the 2nd day of April, 1907, he served the annexed motion upon Ben Goodrich Esq..also an attorney for said defendants in error,by then and there deposi-ng in the post office at said City of Tucson, a true copy of said motion, enclosed in a sealed envelope, and addressed to Ben Goodrich, Esq., at Tombstone, Arizona, his place of residence, postage being prepaid thereon.

S. L. PATTEE.

Subscribed and sworn to before me this 2nd day of April, 1907.
[SEAL.] ALLAN B. JAYNES,
Clerk District Court, Pima County, Arizona.

(Endorsed:) No. 988. In the Supreme Court of the Territory of Arizona. Boquillas Land and Cattle Company, Plaintiff in Error, *vs.* J. N. Curtis *et al.*, Defendants in Error. Motion for Rehearing. Filed April 4, 1907. F. A. Tritle, Jr., Clerk.

123 In the Supreme Court of the Territory of Arizona.

BOQUILLAS LAND AND CATTLE COMPANY, a Corporation, Plaintiff in Error,
vs.
J. N. CURTIS, SAMUEL C. CURTIS, LYMAN CURTIS, and JOHN SUMMERS, Impleaded with Others, Defendants in Error.

The above named plaintiff in error, Boquillas Land and Cattle Company, a corporation, conceiving itself aggrieved by the final judgment entered on the 22nd day of March, 1907, in the above named Court in the above entitled action against it, the said plaintiff in error, and in favor of the said J. N. Curtis, Samuel C. Curtis, Lyman Curtis and John Summers, does hereby appeal therefrom to the Supreme Court of the United States, and said Boquillas Land and Cattle Company, plaintiff in error, hereby prays that its said appeal be allowed, and that a citation be duly signed and issued, and that a transcript of the record, proceedings, opinion and judgment in the case, duly authenticated, may be sent to the Supreme Court of the United States.

BOQUILLAS LAND AND CATTLE COMPANY.
By EUGENE S. IVES, *Its Attorney.*

124 And now, to-wit, on the 24th day of May, 1907, the above application having been duly presented and considered, it is hereby ordered that the appeal above prayed be allowed, and the same is hereby allowed, on filing of good and sufficient bond for costs in the sum of One Thousand Dollars.

RICHARD E. SLOAN,
Justice of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 988. In the Supreme Court of the Territory of Arizona. Boquillas Land and Cattle Company, Plaintiff in Error, *vs.* J. N. Curtis *et al.*, Defendants in Error. Application for Appeal to Supreme Court of the United States and Allowance of Appeal. Filed May 25, 1907. F. A. Tritle, Jr., Clerk, By Angie B. Parker, Deputy.

125 In the Supreme Court of the Territory of Arizona.

BOQUILLAS LAND AND CATTLE COMPANY, a Corporation, Plaintiff in Error,
vs.
J. N. CURTIS, SAMUEL C. CURTIS, LYMAN CURTIS, and JOHN SUMMERS, Impleaded with Others, Defendants in Error.

TERRITORY OF ARIZONA, *County of Cochise, ss:*

Henry K. Street being duly sworn, deposes and says; that he is the Superintendent of the Boquillas Land and Cattle Company, a corporation, the above named plaintiff in error, and has general charge and supervision of the business and property of said company in Cochise County, Territory of Arizona; that he is familiar with the matters in dispute in the above entitled action and the water rights determined by the final decree entered therein; that this action was brought by the above named plaintiff in error against the above named defendants in error and others to obtain a decree perpetually enjoining the defendants from entering upon the lands of said company and building dams or ditches and diverting any of the waters of the San Pedro river from the lands of said company; that by its final decree the District Court awarded to the above named defendants in error the right to enter upon the lands of said company and divert certain waters from said river for use in irrigating certain lands adjacent to the lands of said company; that said decree and judgment was thereafter affirmed by the Supreme Court of said
126 Territory; that the matter in dispute, exclusive of costs, exceeds the sum of Five Thousand Dollars; that the value of the relief sought in this action against the said defendants in error, and which was wholly denied by said decree, is susceptible of measurement, and that the money value of such relief which was sought by said company against said defendants in error and which was wholly denied exceeds the sum of Five Thousand Dollars; that the value of the water rights and the use of the waters of the San Pedro River which was by said judgment and decree awarded to the said

defendants in error is in excess of the sum of Five Thousand Dollars, and the loss occasioned to the plaintiff in error by said decree greatly exceeds said sum of Five Thousand Dollars; that said plaintiff in error is the owner of a large amount of land susceptible to irrigation and cultivation from the waters of said river, and which could be irrigated and cultivated by the use of the water awarded to said defendants in error had the relief sought in this action been granted, and which land would be worth, if irrigated and cultivated by use of the waters the use of which was awarded to the said defendants in error, in excess of the sum of Ten Thousand Dollars, but that by reason of the awarding of the use of such waters to said defendants in error and the deprivation of the use thereof by plaintiff in error such land cannot be irrigated and is practically of no value.

HENRY K. STREET.

Subscribed and sworn to before me this 23rd day of May, 1907.
[SEAL.] HARRY D. CHESELDINE,
Notary Public.
My commission expires Dec. 22, 1908.

127 (Endorsed:) No. 988. In the Supreme Court of the Territory of Arizona. Boquillas Land and Cattle Company, Plaintiff in Error, *vs.* J. N. Curtis *et al.*, Defendants in Error. Affidavit of Value. Filed May 25, 1907. F. A. Tritle Jr. Clerk, by Angie B. Parker, Deputy.

128 In the Supreme Court of the Territory of Arizona.

BOQUILLAS LAND AND CATTLE COMPANY, a Corporation, Plaintiff in Error,
vs.
J. N. CURTIS, SAMUEL C. CURTIS, LYMAN CURTIS, and JOHN SUMMERS, Impleaded with Others, Defendants in Error.

Bond.

Know all men by these presents, that we, Boquillas Land and Cattle Company, a corporation, as principal, and Milton Fairlee and Doane Merrill, as sureties, are held and firmly bound unto J. N. Curtis, Samuel C. Curtis, Lyman Curtis and John Summers, in the sum of One Thousand Dollars, lawful money of the United States, to be paid unto the said J. N. Curtis, Samuel C. Curtis, Lyman Curtis and John Summers, their heirs, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves and our successors heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 23rd day of May, 1907.

The condition of this obligation is such, that whereas the above bounden Boquillas Land and Cattle Company, a corporation, has prose-uted an appeal to the Supreme Court of the United States from a final judgment rendered against it and in favor of said J. N. Curtis,

Samuel C. Curtis, Lyman Curtis and John Summers, in the Supreme Court of the Territory of Arizona, on the 22nd day of March,
129 1907, which appeal has been duly allowed.

Now, therefore, if the said Boquillas Land and Cattle Company, a corporation, shall prosecute its said appeal to effect and answer for all damages and costs if said Boquillas Land and Cattle Company fails to make its said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

BOQUILLAS LAND & CATTLE CO.,
By HENRY K. STREET, *Supt.*
MILTON FAIRLEE.
DOANE MERRILL.

TERRITORY OF ARIZONA, *County of Cochise, ss:*

Milton Fairlee and Doane Merrill being first duly sworn, doth, each for himself and not one for the other, depose and say; that he is a resident and free-holder of the County of Cochise, Territory of Arizona, and is one of the sureties named in and who executed the foregoing bond; that he is worth the sum of One Thousand Dollars, specified in the foregoing bond over and above all his just debts and liabilities and exclusive of property exempt from execution.

[SEAL.] MILTON FAIRLEE.
DOANE MERRILL.

Subscribed and sworn to before me this 23rd day of May, 1907.

HARRY D. CHESELDINE,
Notary Public.

My commission expires Dec. 22, 1908.

130 The foregoing bond having been submitted to me, is approved as to both form and sureties this 24th day of May, 1907.

RICHARD E. SLOAN,
Justice of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 988. In the Supreme Court of the Territory of Arizona. Boquillas Land and Cattle Company, Plaintiff in Error, *vs.* J. N. Curtis *et al.*, Defendants in Error. Bond on Appeal. Filed May 25, 1907. F. A. Tritle, Jr., Clerk, by Angie B. Parker, Deputy.

131 In the Supreme Court of the Territory of Arizona.

BOQUILLAS LAND AND CATTLE COMPANY, a Corporation, Plaintiff in Error,

vs.

J. N. CURTIS, SAMUEL C. CURTIS, LYMAN CURTIS, and JOHN SUMMERS, Impleaded with Others, Defendants in Error.

Statement of Facts by the Supreme Court of Arizona.

An appeal having been taken by the above named plaintiff in error to the Supreme Court of the United States from the judgment entered in the Supreme Court of the Territory of Arizona on the 22nd day of March, 1907, the said Supreme Court of the Territory of Arizona does now make and certify the following statement of the facts of the case in the nature of a special verdict, viz:

I.

That on or about the 8th day of May, 1833, the State of Sonora in the Republic of Mexico, granted and conveyed to one Captain Ygnacio Elias Gonzales and Nepomoceno Felix, their heirs, successors in interest and assigns, that certain tract of land situate at that time in the State of Senora, Republic of Mexico, but now in the County of Cochise, Territory of Arizona, known and designated as the Rancho San Juan de las Boquillas y Nogales, the same being

A strip of land two and one-fourth (2¼) miles in width lying along and extending to a distance of one and one-eighth (1⅛) miles on each side of the San Pedro River, said strip begin-
132 ning at a point on said river about Seven (7) miles above (south of) the town of Fairbank in said County of Cochise, and extending thence down, along and on each side of said river as aforesaid, for a distance of about fourteen and one-half (14½) miles to a point on said river about seven and one-half (7½) miles below (north of) said town of Fairbank.

II.

That prior to the year 1899, W. R. Hearst and Phoebe A. Hearst, and Phoebe A. Hearst as administratrix with the will annexed of George Hearst, deceased, instituted an action to confirm the said grant in the Court of Private Land Claims of the United States; that the defendants in said action, among others, were the United States, and the St. David Canal Company, J. N. Curtis, Samuel Curtis and John Summers, defendants in this action.

That in and by said action it was found and adjudged that the plaintiffs therein had acquired an undivided interest in and to the said lands hereinabove described, by conveyance executed to them by the heirs-at-law of the said original grantees hereinbefore named, and in said action, it was further adjudged, on the 14th day of February, 1899, that the title to said grant and the said premises was

confirmed by the said court to the said original grantees, and their successors in interest and assigns, and the decree of approval and confirmation was duly certified to the General Land Office of the United States.

That in pursuance of said decree and certification, on the 14th day of December, 1900, a patent was duly issued by the United States government giving and granting unto the said Gonzales and Felix and their successors in interest and assigns, the said land, together with all the hereditaments and appurtenances there-
133 unto belonging.

III.

That thereafter and on the 3rd day of July, 1901, the said W. R. Hearst and Phoebe A. Hearst duly conveyed the said lands, together with the hereditaments and appurtenances thereunto belonging, to the plaintiff, the Boquillas Land and Cattle Company, a corporation, and that said company is now and ever since said last named date has been the owner thereof.

IV.

That the said San Pedro River is a natural stream of water which rises in the mountains in the State of Sonora near the boundary line between the Republic of Mexico and the said County of Cochise and flows from said mountains down to the said County of Cochise and into and through the said county to a point in the County of Pinal where it flows into the Gila River and thence through the Colorado River to the Gulf of California and the Pacific Ocean. That such river in such course naturally flows through the said lands of said Boquillas Land and Cattle Company and thereby waters and sub-irrigates and renders the same much more fertile, productive and valuable.

V.

That the title of said Boquillas Land and Cattle Company, the plaintiff in this action, and its predecessors in interest to the said lands and premises has long been in dispute, and that the right of the predecessor in interest of the said plaintiff to the exclusive ownership and possession of the said lands and premises was not ascertained and determined until the year 1900, when the aforesaid patent was issued by the government of the United States; and that the title to part of the said lands and premises is still wrong-
134 fully disputed by persons who have been in possession of parts thereof, and who refuse to remove therefrom and to recognize the said patent.

That by reason of the said litigation and dispute the predecessors in interest of the said plaintiff and the said plaintiff have not heretofore made actual and physical use of all of the waters of the said river; but that the flow of water in the said river is not sufficient to irrigate all of the said lands and premises belonging to the said plaintiff as aforesaid which are susceptible of irrigation.

VI.

That in the year 1877 certain persons entered upon the said lands and premises and constructed across the San Pedro River a dam at a certain point about 1½ miles below and north of the town of Fairbank for the purpose of diverting water from the said river and constructed a canal or ditch from said point of diversion over and through portions of the said lands. That said ditch was about 6 feet wide at the bottom and about 3 feet deep.

VII.

That on or about the year 1883 the said ditch was extended from its point of terminus upon the said lands to a point about seven miles north of the northern boundary line of the said grant to the town known as "Old St. Davids."

That within two years thereafter the said extension was abandoned and disused, and that no part of the same was used from that time until after the year 1902, except that the defendant J. N. Curtis from the year 1883 to and including the year 1903, irrigated through the said extension 40 acres of land lying north of and adjacent to
135 the said northern boundary of the said grant.

VIII.

That in the year 1902, the defendant John Summers rebuilt an extension of the said ditch from its terminus upon the said last mentioned land of the said J. N. Curtis, to a point about ½ mile north of the said lands, and did during the year 1903, irrigate through such extension so built and through said original ditch about forty acres of land.

IX.

That the defendant Lyman Curtis did in or about the year 1900, construct a lateral about 200 yards long extending eastwardly from the terminus of the said ditch at the said last mentioned land of the said J. N. Curtis, and did irrigate therefrom up to and including the year 1903 about 20 acres of land.

X.

That the defendant Samuel C. Curtis did, in or about the year 1900, construct a short lateral running eastwardly from the terminus of the said ditch at the said last mentioned land of the said J. N. Curtis, and did irrigate therefrom up to and including the year 1903 about 20 acres of land.

XI.

That the total amount of land irrigated out of the said ditch and being upon the said grant, is about 260 acres.

XII.

That in the year 1901, the flood waters of the said river washed out and obliterated the said dam so constructed.

That in the year 1903 a new dam was constructed about 200 yards south of the point where the original dam was constructed,
136 and that said dam was washed out in the winter of 1903 and 1904, and that no lands were irrigated out of the said ditch during the years 1902, 1904 or 1905.

XIII.

That prior to the year 1890, a dam was built by the defendant the St. David Canal Company, at a point in the said river on the said grant about five miles north of the point where the said first dam was built as aforesaid, and about one mile south of the northern boundary of the said grant, and that a ditch or canal was constructed from said point by said St. David Canal Company from the said lands and across the land of the said grant and through other lands to the town of St. David.

XIV.

That at no time did the said St. David Canal Company have any interest in the said first mentioned ditch or dam constructed as aforesaid, and at no time was there any physical connection *connection* between the said ditch first constructed as aforesaid and the said ditch of the St. David Canal Company, and none of the waters diverted from the said first mentioned dam were conducted or transported from the said ditch so first constructed as aforesaid into the ditch of the St. David Canal Company.

XV.

That all of the above named defendants are engaged in the cultivation of farming lands by irrigation and that the value of the said land is greatly enhanced by the use of the waters thereupon for the purposes of irrigation, and that water for such purpose is necessary for the proper cultivation of the said land and growing crops thereupon.

XVI.

That prior to the commencement of this action neither
137 the plaintiff nor any of its predecessors in interest, except as hereinbefore found, appropriated or used any of the said waters for the purposes of irrigation, but that the said plaintiff from the time of its acquisition of the said grant did use the said waters for the purpose of watering stock, and for such other uses upon the lands of the plaintiff as would follow and be appurtenant to the natural flow of the said water in the said river without any artificially constructed dams, canals or other methods of diversion.

XVII.

That in or about the month of December, 1904, the defendants without the consent of the plaintiff, entered upon the said lands and premises of the plaintiff at or about a point where the said dam was constructed in the year 1903, and commenced and threatened to rebuild the said dam and to rebuild portions of said ditch lying upon the lands and premises of the plaintiff, without the consent of the plaintiff, and the said defendants intended and threatened without the consent of the plaintiff to divert waters out of the said river and through the said ditch when so constructed into the canal or ditch of the defendant, the St. David Canal Company.

XVIII.

That the said threats were open, notorious and to the effect that such diversion will be continuous and uninterrupted under claim of right and adverse to the whole world except the defendants and those acting in co-operation with them; and that the defendants, unless restrained by injunction will enter upon the said lands of plaintiff and build such ditch and dam and head gate thereon,
138 and will cause such diversion to be made and will continue the same and prevent the said waters from flowing down to, along or over the said land of the plaintiff where they would naturally flow, and that the defendants will thereby acquire an easement over the plaintiff's lands and the right as against the plaintiff to continue the said diversion and will cause great and irreparable injury to the plaintiff.

Dated May 27th, 1907.

By the Court,

RICHARD E. SLOAN,
Justice of the Supreme Court
of the Territory of Arizona.

(Endorsed:) No. 988. In the Supreme Court of the Territory of Arizona. Boquillas Land and Cattle Company, Plaintiff in Error *vs.* J. N. Curtis *et al.*, Defendants in Error. Statement of Facts by Supreme Court of Arizona. Filed June 3, 1907. F. A. Tritle, Jr., Clerk.

139 In the Supreme Court of the United States.

BOQUILLAS LAND AND CATTLE COMPANY, a Corporation, Appellant,
vs.
J. N. CURTIS, SAMUEL C. CURTIS, LYMAN CURTIS, and JOHN SUMMERS, Impleaded with Others, Appellees.

Assignment of Errors.

The appellant herein assigns the following errors committed by the Supreme Court of the Territory of Arizona:

I.

The said Supreme Court erred in affirming the third conclusion of law of the District Court, that the defendant J. N. Curtis is entitled to construct or aid in the construction of said dam and ditch for the purpose of having 40-380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed and delivering the same for the use upon the said 40 acres of land of J. N. Curtis lying immediately north of the northern boundary of the said grant for the reason that:

a. The predecessors in interest of the plaintiff under the said Mexican land grant became vested with whatever rights the original grantees from the Mexican Government had under the Mexi-
140 can law at the time of the cession of the territory of Mexico to the United States, and such rights are repugnant to the rights adjudged to the defendants by the Court.

b. The plaintiff and its predecessors in interest under the Mexican land grant became vested in 1864 by virtue of the laws of Arizona then adopted with riparian rights in the waters of the San Pedro River, which rights are repugnant to the rights of the defendants in error as adjudged by the Court.

II.

The said Supreme Court erred in affirming the fourth conclusion of law of the district court, that the defendant Lyman Curtis is entitled to construct or aid in the construction of said dam and ditch for the purpose of having 20-380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed and delivering the same for the use upon the said 20 acres of land of the said Lyman Curtis lying immediately north of the northern boundary of the said grant for the same reasons as in the first assignment of error set forth.

III.

The said Supreme Court erred in affirming the fifth conclusion of law of the district court that the defendant Samuel C. Curtis is entitled to construct or aid in the construction of said dam and ditch for the purpose of having 20-380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed and delivering the same for the use upon the said 20 acres of land of the said Samuel C. Curtis lying immediately north of the northern boundary of the said grant for the same reasons as in the first assignment of error set forth.

141 IV.

The said Supreme Court erred in affirming the sixth conclusion of law of the district court that the defendant John Summers is entitled to construct or aid in the construction of said dam and ditch for the purpose of having 40-380 of the water which would flow

through a ditch of the same size and grade as the said ditch first constructed and delivering the same for the use upon the said 40 acres of land of the said John Summers lying immediately north of the northern boundary of the said grant for the same reason as in the first assignment of error set forth.

V.

The said Supreme Court erred in affirming the seventh conclusion of law of the district court that the said last mentioned defendants, to-wit: J. N. Curtis, Lyman Curtis, Sam Curtis and John Summers have a right, title and interest in and to and a right of way over, and an easement over and upon the lands of the plaintiff for the purpose of building a dam and a ditch or canal not over six feet wide at the bottom and three feet deep; and that the said defendants and the plaintiff each have the right to use a proportionate part of the water flowing through the said ditch, in the ratio of their respective acreages as hereinbefore found, provided, however, that neither the plaintiff nor any one of the said defendants shall have the right to the carriage of said water through the said ditch or to use any of the waters flowing through the same unless such plaintiff or defendant shall have contributed his proportionate share to the construction and maintenance of said canal, dam and ditch, or shall pay to the parties hereto who may construct and maintain said dam and ditch a reasonable and satisfactory charge for the
142 carriage and delivery of the said water, for the reasons stated in the first assignment of error.

VI.

The said Supreme Court erred in affirming the judgment of the district court and in holding that the appellant was not entitled to the relief praved against the above-named appellees, for the reason stated in the first assignment of error.

VII.

The said Supreme Court erred in affirming the judgment of the district and in holding that the above-named appellant is not entitled to any relief as against the above-named appellees.

Dated May 24th, 1907.
Respectfully submitted.

EUGENE S. IVES,
Counsel for Appellant.

(Endorsed:) No. 988. Supreme Court, United States. Boquillas Land & Cattle Co., Plaintiff, *vs.* J. N. Curtis, *et al.*, Defendants. Assignment of Errors. Filed June 17, 1907. F. A. Tritle, Jr. Clerk.

143 In the Supreme Court of the Territory of Arizona.

Be it remembered that heretofore and on to-wit the 15th day of January A. D. 1907, the same being one of the regular juridical days of the January Term, A. D. 1907, of said Court, the following order, *inter alia*, was had and entered of record in said Court, which said order is in words and figures, as follows, to-wit:

No. 988.

BOQUILLAS LAND & CATTLE COMPANY, a Corporation, Plaintiff in Error,

vs.

THE ST. DAVID CO-OPERATIVE COMMERCIAL & DEVELOPMENT ASSOCIATION, a Corporation, ET AL., Defendants in Error.

On motion of Mr. S. L. Pattee, attorney for Appellants herein, It is ordered that this cause be set for hearing January 18th, 1907.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 988.

BOQUILLAS LAND & CATTLE COMPANY, a Corporation, Plaintiff in Error,

vs.

THE ST. DAVID CO-OPERATIVE COMMERCIAL & DEVELOPMENT ASSOCIATION, a Corporation, ET AL., Defendants in Error.

144 On motion of Mr. S. L. Pattee, for Plaintiff in Error herein, It is ordered that this cause be re-set for January 26, 1907.

And afterwards and upon to-wit the 16th day of January, A. D. 1907, the same being one of the regular juridical days of the January Term A. D., 1907, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 988.

BOQUILLAS LAND & CATTLE COMPANY, a Corporation, Plaintiff in Error,

vs.

THE ST. DAVID CO-OPERATIVE COMMERCIAL & DEVELOPMENT ASSOCIATION, a Corporation, ET AL., Defendants in Error.

On motion of Mr. S. L. Pattee, for Plaintiff in Error herein, It is ordered that he be granted permission to correct typographical error in briefs of Plaintiff in Error.

And afterwards and upon to-wit the 26th day of January, A. D. 1907, the same being one of the regular juridical days of the January Term A. D., 1907, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

145 No. 988.

BOQUILLAS LAND & CATTLE COMPANY, a Corporation, Plaintiff in Error,

vs.

THE ST. DAVID CO-OPERATIVE COMMERCIAL & DEVELOPMENT ASSOCIATION, a Corporation, ET AL., Defendants in Error.

On motion of Mr. S. L. Pattee, for Plaintiff in Error herein, It is ordered that this cause be submitted on briefs, without argument.

And afterwards and upon to-wit the 22nd day of March, A. D. 1907, the same being one of the regular juridical days of the January Term A. D., 1907, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 988.

BOQUILLAS LAND & CATTLE COMPANY, a Corporation, Plaintiff in Error,

vs.

THE ST. DAVID CO-OPERATIVE COMMERCIAL & DEVELOPMENT ASSOCIATION, a Corporation; THE ST. DAVID CANAL COMPANY, a Corporation; JOHN MERRILL, J. N. CURTIS, SAMUEL CURTIS, JOHN SUMMERS, JOHN DOE, and RICHARD ROE, Whose Names are Unknown, Defendants in Error.

This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises: It is ordered that the
146 judgment of the Court below be, and the same is, hereby affirmed.

It is further ordered, adjudged and decreed that the Defendants in Error herein, do have and recover of and from the Boquillas Land & Cattle Company, a corporation, Plaintiff in Error, and W. C. Land and H. W. Etz, sureties on Appeal Bond herein, their costs in this Court, taxed at twenty-four and 50/100 ($24.50) dollars, together with their costs in the court below in this cause incurred.

And afterwards and upon to-wit the 23d day of May, A. D. 1907, the same being one of the regular juridical days of the January Term A. D., 1907, of said Court, the following order *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 988.

BOQUILLAS LAND & CATTLE COMPANY, a Corporation, Plaintiff in Error,

vs.

THE ST. DAVID CO-OPERATIVE COMMERCIAL & DEVELOPMENT ASSOCIATION, a Corporation, ET AL., Defendants in Error.

It is ordered that the Motion for Re-hearing filed herein by Appellant, be submitted.

And afterwards and upon to-wit the 24th day of May, A. D. 1907, the same being one of the regular juridical days of the January Term A. D. 1907, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

147 No. 988.

BOQUILLAS LAND & CATTLE COMPANY, a Corporation, Plaintiff in Error,

vs.

THE ST. DAVID CO-OPERATIVE COMMERCIAL & DEVELOPMENT ASSOCIATION, a Corporation, ET AL., Defendants in Error.

It is ordered that the Motion for Re-hearing filed herein by Plaintiff in Error, and heretofore submitted, be and the same is hereby, denied.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows to-wit:

No. 988.

BOQUILLAS LAND & CATTLE COMPANY, a Corporation, Plaintiff in Error,

vs.

THE ST. DAVID CO-OPERATIVE COMMERCIAL & DEVELOPMENT ASSOCIATION, a Corporation, ET AL., Defendant- in Error.

At this day comes S. L. Pattee, Esq., for Appellant herein, in open Court and gives notice of Appeal from the judgment of this Court, to the Supreme Court of the United States.

Upon motion of S. L. Pattee, Esq., for Appellant herein, it is ordered that the amount of the Bond on Appeal be fixed in the sum of One Thousand ($1,000) Dollars.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

148 No. 988.

BOQUILLAS LAND & CATTLE COMPANY, a Corporation, Plaintiff in Error,

vs.

THE ST. DAVID CO-OPERATIVE COMMERCIAL & DEVELOPMENT ASSOCIATION, a Corporation, ET AL., Defendant- in Error.

At this day, upon motion of attorney for Plaintiff in Error, herein, it is ordered that he be granted time in which to file Affidavit of Value.

149 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Territory of Arizona, ss:*

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify that the foregoing pages numbered from 1 to 148 inclusive, contain a true and complete transcript of the Judgment Roll, Verdict of the Jury, Petition for Writ of Error, Record on Appeal, Summons, Opinion, Motion for Re-hearing, Application and Allowance of Appeal, Affidavit of Value, Bond on Appeal, Statement of Facts, Assignment of Errors and Minute Entries in the case of Boquillas Land & Cattle Company, a corporation, Plaintiff in Error, *v.* The St. David Co-operative Commercial & Development Association, a corporation, *et al.*, Defendant- in Error, as the same remain of record and on file in my office.

Also that the Citation attached hereunto, is the original citation issued by said Supreme Court of the Territory of Arizona, in the said above entitled cause.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Supreme Court at Phœnix, Arizona this 29th day of June, 1907.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, Jr.,
Clerk Supreme Court of Arizona.

150 *Citation.*

In the Supreme Court of the United States.

BOQUILLAS LAND AND CATTLE COMPANY, a Corporation, Appellant,
vs.
J. N. CURTIS, SAMUEL C. CURTIS, LYMAN CURTIS, and JOHN SUMMERS, Appellees.

The United States of America to J. N. Curtis, Samuel C. Curtis, Lyman Curtis, and John Summers, Greeting:

You and each of you are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington, District of Columbia, on the 23rd day of July, 1907, pursuant to an appeal duly allowed by the Honorable Richard E. Sloan, Justice of the Supreme Court of the Territory of Arizona, on the 24th day of May, 1907, and duly filed with the Clerk of the said Court from a judgment rendered in the said Supreme Court of the Territory of Arizona on the 22nd day of March, 1907, in an action on writ of error from that court, wherein you were defendants in error and said Boquillas Land and Cattle Company was plaintiff in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error and in your favor should not be set aside annulled and reversed and why speedy justice should not be done to the party in whose behalf the said appeal is allowed.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 24th day of May, 1907.

RICHARD E. SLOAN,
Justice of the Supreme Court of the Territory of Arizona.

151 [Endorsed:] No. 988. In the Supreme Court of the United States. Boquillas Land and Cattle Company, Appellant, *vs.* J. N. Curtis *et al.*, Appellees. Citation. Service of copy of the within writ acknowledged this May 31 1907. Pickett & Bowman, and Ben Goodrich, Attorneys Appellees J. N. Curtis *et als.* Filed June 17 1907. F. A. Tritle, Jr., Clerk.

Endorsed on cover: File No. 20,796. Arizona Territory supreme court. Term No. 133. Boquillas Land and Cattle Company, appellant, *vs.* J. N. Curtis, Samuel C. Curtis, Lyman Curtis, and John Summers. Filed July 15th, 1907. File No. 20,796.

SUPREME COURT, U. S.
FILED
FEB 28 1908
JAMES H. MCKENNEY,
CLERK

Supreme Court

OF THE

United States

October Term, 1908.

No. 193.

Boquillas Land & Cattle Company,

Appellant,

vs.

S. E. Curtis, Samuel C. Curtis, Lyman Curtis and John Summers,

Appellees.

BRIEF OF APPELLANT.

EUGENE S. IVES,

[redacted]

Attorneys for Appellant.

Parker & Stone Co., Law Printers, 332 West Fifth St., Los Angeles

Supreme Court

OF THE

United States

October Term, 1908.

No. 133.

Boquillas Land & Cattle Company,

Appellant,

vs.

J. N. Curtis, Samuel C. Curtis, Lyman Curtis and John Summers,

Appellees.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This action was brought in the District Court of Cochise county, territory of Arizona, to restrain the appellees and others from entering upon the premises of the appellant, and diverting the waters of the San Pedro river.

Upon the trial in the District Court a decree

was rendered denying the relief sought as against the four appellees. The appellant thereupon sued out a writ of error to review this decree (a practice permitted by the statutes of Arizona), and upon review by that court, the decree of the District Court was affirmed. From such judgment of affirmance, an appeal was taken to this court.

The facts, which are wholly undisputed, may be briefly stated as follows:

On or about the 8th of May, 1833, the state of Sonora, in the Republic of Mexico, granted and conveyed to Captain Ignatius Elias Gonzales and Nepomesino Felix, their heirs, successors in interest and assigns, that certain tract of land then situated in the state of Sonora, but now in the county of Cochise, territory of Arizona, known as the Rancho San Juan de las Boquillas y Nogales.

This tract consisted of a strip of land 1⅛ miles in width on each side of the San Pedro river, and extending about 14½ miles along the river.

By conveyances from the heirs at law of the original grantees it passed into the ownership of William R. Hearst, Phoebe A. Hearst, and Phoebe A. Hearst, as administratrix with the will annexed of George Hearst, deceased.

In April, 1899, the Hearsts filed their petition and commenced suit in the Court of Private Land

Claims for the purpose of obtaining a confirmation of said grant.

Among the defendants in that suit were the United States and John N. Curtis, Samuel Curtis and John Summers, three of the appellees.

On February 14th, 1899, the judgment of the Court of Private Land Claims was rendered confirming said grant to the original grantees, their successors and assigns.

This judgment was certified to the commissioner of the General Land Office of the United States, and thereafter and on December 14, 1900, patent was issued for the land comprised within the grant with all the hereditaments and appurtenances thereunto belonging, to the original grantees and their assigns.

On July 3, 1900, the Hearsts conveyed the said land, together with the hereditaments and appurtenances thereunto belonging to the appellant, the Boquillas Land and Cattle Company, which ever since such date has been the owner thereof.

The land comprised within this grant was ceded by the Republic of Mexico to the United States by the treaty of June 30th, 1854, and is comprised within what is commonly known as the Gadsden Purchase.

The San Pedro river is a natural stream of water which rises in the mountains in the state of Sonora, near the international boundary line,

between Mexico and Arizona, and flows through the county of Cochise to a point in the county of Pinal where it flows into the Gila river, and thence through that river and the Colorado river to the Gulf of California and the Pacific Ocean. The San Pedro river in its natural course flows through the land of the appellant, and thereby waters and sub-irrigates and renders the same fertile, productive and valuable.

The title of the appellant and its predecessors in interest to the land comprised within said grant, has long been in dispute, and was not ascertained and determined until the year 1900, when the patent was issued by the government of the United States. Its title to a part of the land is still disputed by persons who have been in possession of parts thereof, and who refused to recognize the patents or to remove from the lands. By reason of the litigation and dispute, the appellant and its predecessors in interest have not heretofore made actual and physical use of all the waters of said river; and the flow of water in the said river is not sufficient to irrigate all of the lands belonging to the appellant which are susceptible of irrigation.

Prior to the commencement of this suit, neither the appellant nor any of its predecessors in interest, except to the extent heretofore stated, appropriated or used any of the waters of the river for the purpose of irrigation; but from the time

of its acquisition of the grant, the appellant has used the waters for the purpose of watering stock and for such other uses upon its lands as would follow and be appurtenant to the natural flow of water in the river without any artificially constructed dams, canals or other methods of diversion.

In the year 1877, certain persons entered upon the lands of the appellant and constructed across the San Pedro river a dam for the purpose of diverting water from the river, and constructed a canal or ditch from the point of diversion through portions of said lands. About 1883 the ditch was extended to a point about seven miles north of the northern boundary line of said grant. Within two years thereafter the extension was abandoned and disused, and no part of the same was used from that time until after the year 1902, except that the appellee John N. Curtis from the year 1883 to and including the year 1903, irrigated through said extension forty acres of land lying north of and adjacent to the northern boundary of the grant.

The appellees John Summers, Lyman Curtis and Samuel Curtis built extensions or lateral ditches from the said ditch and by means thereof, during various years, [illegible] 1900 to 1903 irrigated tracts of land. The total amount of land irrigated out of said ditch and included within appellant's grant was 260 acres.

In the year 1901 the waters of the river washed out the dam, and in the year 1903 a new dam was constructed about 200 yards south of the location of the original dam. The latter dam was washed out in the winter of 1903-4 and no land was irrigated out of the ditch during the years 1902, 1904 or 1905.

About the month of December, 1904, the appellees and others undertook to construct a new dam in the place of the old one which had been destroyed by the flood and to rebuild portions of the ditch upon the land of appellant, for the purpose of diverting waters out of the river and through the ditch. The appellant then began this suit to restrain the appellees and others from entering upon its land for the purpose of constructing said dam and ditch and from diverting waters from the San Pedro river off the said lands, and alleged that the defendants commenced and threatened, without the consent of the appellant, to divert waters from the said river and through the ditch when constructed, and to continue such diversion and that such diversion would be made and continued and the waters of the river prevented from flowing in their natural course through and over the land of the appellant and an easement thereby acquired over the appellant's lands unless injunctive relief should be granted. The court found these allegations to be true.

The appellees claimed the right to enter upon the lands of the appellant and appropriate the waters of the San Pedro river by reason of their previous appropriation, and by reason of the claimed right to appropriate the same prior to any actual use of all such waters by the appellant.

The questions presented on this appeal are, therefore, the right of the appellees under the so-called doctrine of appropriation, which obtains in Arizona and other western states and territories, as against the owner of the riparian lands, whose ownership existed prior to any attempted appropriation.

Specification of Errors.

I.

The said Supreme Court erred in affirming the third conclusion of law of the District Court, that the defendant J. N. Curtis is entitled to construct or aid in the construction of said dam and ditch for the purpose of having 40-380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed and delivering the same for the use upon the said 40 acres of land of J. N. Curtis lying immediately north of the northern boundary of the said grant, for the reason that:

a. The predecessors in interest of the appel-

lant under the said Mexican land grant became vested with whatever rights the original grantees from the Mexican government had under the Mexican law at the time of the cession of the territory of Mexico to the United States, and such rights are repugnant to the rights adjudged to the appellees by the court.

b. The appellant and its predecessors in interest under the Mexican land grant became vested in 1864 by virtue of the laws of Arizona then adopted with riparian rights in the waters of the San Pedro river, which rights are repugnant to the rights of the appellees as adjudged by the court.

c. The predecessors in interest of the appellant became the owners of the land referred to by virtue of a grant from the Mexican government, and such ownership has been continuous to the present time, and as against such owners, the right to enter upon their lands and appropriate waters from the stream could not attach, the doctrine of appropriation applying only to public lands.

d. The appellees were not entitled to enter upon the lands of the appellant, without its consent and without compensation, and to construct thereon dams and ditches and acquire an easement in or over appellant's lands.

II.

The said Supreme Court erred in affirming the fourth conclusion of law of the District Court, that the defendant Lyman Curtis is entitled to construct or aid in the construction of said dam and ditch for the purpose of having 20-380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed and delivering the same for the use upon the said 20 acres of land of the said Lyman Curtis lying immediately north of the northern boundary of the said grant for the same reasons as in the first specification of error set forth.

III.

The said Supreme Court erred in affirming the fifth conclusion of law of the District Court that the defendant Samuel C. Curtis is entitled to construct or aid in the construction of said dam and ditch for the purpose of having 20-380 of the water which would flow through a ditch of the size and grade of the said ditch first constructed and delivering the same for the use upon the said 20 acres of land of the said Samuel C. Curtis lying immediately north of the northern boundary of the said grant, for the same reasons as in the first specification of error set forth.

IV.

The said Supreme Court erred in affirming the

sixth conclusion of law of the District Court that the defendant John Summers is entitled to construct or aid in the construction of said dam and ditch for the purpose of having 40-380 of the water which would flow through a ditch of the same size and grade as the said ditch first constructed and delivering the same for the use upon the said 40 acres of land of the said John Summers lying immediately north of the northern boundary of the said grant for the same reason as in the first specification of error set forth.

V.

The said Supreme Court erred in affirming the seventh conclusion of law of the District Court that the said last mentioned defendants, to-wit: J. N. Curtis, Lyman Curtis, Sam Curtis and John Summers have a right, title and interest in and to and a right of way over, and an easement over and upon the lands of the plaintiff for the purpose of building a dam and a ditch or canal not over six feet wide at the bottom and three feet deep; and that the said defendants and the plaintiff each have the right to use a proportionate part of the water flowing through the said ditch, in the ratio of their respective acreages as hereinbefore found, provided, however, that neither the plaintiff nor any one of the said defendants shall have the right to the carriage of said water through the said ditch or to use any of the waters flowing through the same unless such plaintiff or defend-

ant shall have contributed his proportionate share to the construction and maintenance of said canal, dam and ditch, or shall pay to the parties hereto who may construct and maintain said dam and ditch a reasonable and satisfactory charge for the carriage and delivery of the said water, for the reasons stated in the first specification of error

VI.

The said Supreme Court erred in affirming the judgment of the District Court and in holding that the appellant was not entitled to the relief prayed against the above named appellees, for the reason stated in the first specification of error.

VII.

The said Supreme Court erred in affirming the judgment of the District Court and in holding that the above-named appellant is not entitled to any relief as against the above-named appellees.

The Case is Properly Here Upon Appeal.

It appears from the record that certain specific issues of fact were submitted to a jury, who returned answers to the questions submitted. This does not make the cause one tried by jury so as to require its review by writ of error.

The settled rule in Arizona is that the verdict of a jury in an equity case is advisory only and that the findings of a jury in answer to special

questions submitted may be either adopted or rejected by the court.

Henry v. Mayer, 6 Arizona 103.

The trial of an equity case where special issues are submitted to a jury is not a trial by jury within the meaning of the act of congress regulating the review by this court of the judgment of territorial courts.

Idaho & Oregon Land Imp. Co. v. Bradbury, 132 U. S. 509.

It will be seen from the facts found by the Supreme Court that the claim of the appellees to enter upon the lands of appellant and divert waters is not based either upon prescription or upon any license or grant from appellant or its predecessors in interest, or the United States government. Such claim of appellees is based on the right of appropriation only. In other words, upon the doctrine and theory that anyone who desires to use water which is not being actually used by another, may enter upon private lands at will and take the water, and that having so taken it, his right to it continues so long as he continues to use it.

Appellant's claim to the exclusive use of the water in question (it being conceded and found by the court that there is not sufficient water in the stream for proper use upon appellant's lands)

is based upon the following series of propositions:

First: If the right to the water at any time vested in appellant or its predecessors in interest, such right cannot be taken away except by due process of law and compensation.

Second: The title to both land and water having been originally in the Mexican government passed to appellant's predecessors in interest by the grant of 1833.

Third: If the grant to the Mexican government did not convey to appellant's predecessors in interest, the right to the water, then by the Gadsden Purchase the title to such water vested in the United States government, and by virtue of the patent of the United States government passed to appellant's predecessors in interest as of the date of its acquisition by the United States government, to-wit, the date of the Gadsden Purchase.

Fourth: If the right to the water did not pass to appellant's predecessors in interest as asserted in propositions second and third, then appellant's predecessors in interest became vested with the rights of a riparian proprietor at common law by virtue of the laws of Arizona enacted in 1864 and known as the Howell Code.

The legal questions presented by the facts found will be discussed without regard to what may be the rule under the present statutes of Ari-

zona, or what such rule might have been had appellant's title been acquired subsequent to appropriation of the waters by appellees or any other persons.

I.

Riparian rights once vested are property rights and cannot be taken away except by the exercise of the right of eminent domain.

As shown by the authorities cited in another portion of this brief, the right of a riparian proprietor to the flow of the water of the stream is held to annex inseparably to the soil, and passes with it, not as an easement or appurtenance, but as a part and parcel of it.

Long on Irrigation, Sec. 12.

Or, as expressed by another author, quoting from the Supreme Court of California, the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it not as an easement and appurtenance but as part and parcel of it.

Black's Pomeroy on Water Rights, Sec. 9;
Lux v. Haggin, 69 Cal. 255.

The right of the riparian proprietor is therefore a private right, which, once vested, is entitled to complete protection, and can be divested

only by the due process of law guaranteed by the fourteenth amendment.

As was said by this court in Sturr v. Beck, 133 U. S., at page 541:

> "The right of the riparian proprietor of land bordering upon a running stream, to the benefits to be derived from the flow of its waters is a natural incident to or one of the elements of his estate, and that it cannot be lawfully divested against his consent, is not denied."

And again, in the course of the same opinion:

> "When, however, the government ceases to be the sole proprietor, the right of the riparian owner attaches and cannot be subsequently invaded. As a riparian owner has the right to have the water flow *ut currere solebat* undiminished except by reasonable consumption of upper proprietors and no subsequent attempt to take the water can override the prior appropriation of both land and water, it would seem reasonable that the lawful riparian occupancy with intent to appropriate the land, should have the same effect."

Farnham thus states the law:

> "The right of using the water and access to it is generally regarded as a property right, of which the riparian owner cannot be deprived for the private use of another, nor for public use without receiving compensation. In accordance with this rule after the rights have once attached to land, they cannot be destroyed by change of law under the clause of the federal constitution, which provides that persons shall not be de-

prived of property rights without due process of law."

1 Farnham on Water and Water Rights 282;

Benton v. Johncox, 17 Wash. 277; 39 L. R. A. 107; 49 P. 495; 61 Am. St. Rep. 912.

In Clark v. Cambridge and Arapahoe Irrigation and Improvement Company, 45 Neb. 798; 64 N. W. 239, it is said:

> "The right of a riparian proprietor as such is property and when vested can be destroyed or impaired only in the interest of the general public upon full compensation and in accordance with established law."

Citing among other cases:

Lux v. Haggin, 69 Cal. 255;

Yates v. Milwaukee, 10 Wall. 497;

Potomac Steamboat Co. v. Upper Potomac Steamboat Co., 109 U. S. 672;

Delaplaine v. Railway Co., 42 Wis. 214;

Belle v. Gough, 23 N. J. Law 624;

Water Co. v. Raff, 36 N. J. Law 635.

And this statement is followed and quoted with approval in Crawford Co. v. Hathaway, 67 Neb. 325; 60 L. R. A. 889; 93 N. W. 781.

In Yates against Milwaukee, 10 Wall. 497, at page 504, the court says:

> "This riparian right is property, and is valuable, and, though it must be enjoyed in

> due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

In Bigelow v. Draper, 6 N. D. 152; 69 N. W. 570, it was said, speaking of a provision of the North Dakota constitution, which provided that all flowing streams and natural water courses should forever remain the property of the state for mining, irrigation and manufacturing purposes:

> "These doctrines of the common law were in force in the territory of Dakota at the time of the adoption of the constitution of this state. By virtue of them the riparian owners in the territory were vested with the specified property rights in the bed of all natural water courses and in the water itself. Such rights were under the protection of the fourteenth amendment to the federal constitution, which protects property against all state action that does not constitute due process of law. It follows that section 210 of the state constitution would itself be unconstitutional in so far as it attempted to destroy those vested rights of property, if it should, by construction, be given a scope sufficiently wide to embrace such matters."

It was held by that court that notwithstanding its broad language, the provision of the constitution was not intended to affect the owners of

riparian lands whose rights had vested prior to the adoption of the constitution. The same reasoning may well be applied to the provision of the Howell Code making all streams public waters, applicable to the purposes of irrigation, mining, etc. The reasonable construction to be given such provision, especially in view of the vested rights of riparian proprietors, is that such provision was only intended to govern rights arising in the future, and not to affect the rights of persons already owning riparian lands.

It follows, therefore, that if the rights of a riparian proprietor once vested in the owner of the lands bordering upon the San Pedro river, such right became a vested property right, which could not be impaired or taken away by subsequent legislation, and the abolition of the doctrine of riparian rights and the substitution of the doctrine of appropriation, left unaffected the rights which the owner of such lands had already acquired.

II.

Appellant's ownership within the Mexican grant having been continuous since the date of the grant the patent operated as a consummation of such title, and also as a quit-claim of whatever interest the United States acquired by the cession.

The provisions of the treaty under which the so-called Gadsden Purchase was acquired by the United States will be considered more at length

in another portion of this brief. At this time, it is sufficient to say that by article 8 of the treaty with Guadalupe Hidalgo, which is incorporated into the Gadsden treaty by provision of article 5 of the latter treaty, all property rights belonging to Mexicans under the ceded territory, were preserved.

The Act of Congress of March 3, 1901, establishing the Court of Private Land Claims and regulating the procedure in that court, provides for the confirmation of title to Mexican land grants; section 8 of that act provides that the decree of the court shall be certified to the General Land Office of the United States, and that patent shall thereupon issue to the person in whom said grant is confirmed.

The effect of the decrees of similar tribunals and of the patents issued pursuant to such decrees has been before this court several times and it has always been held that the effect of the confirmation and of the patent issued pursuant to it was to determine that title to the granted premises existed from the date of the grant, and existed at the time of the cession by Mexico to the United States.

The patent except as a quit-claim of the interest of the United States, does not operate to create a title; whatever may be its language its effect is merely to declare the existence of the title from the date of the grant.

An additional effect of the patent is that it operates necessarily as a quit-claim from the United States to the grantee or his successors in interest, of whatever interest the United States had in the granted premises, as such interest existed at the date of the treaty.

The effect of this quit-claim is not merely to release or convey such interest as the United States might have at the time of the issuance of the patent, leaving a possible claim of intervening rights in third parties; but to quit-claim all rights which the United States acquired by the treaty of cession. Good faith, as well as treaty obligations, require the government of the United States to protect the property rights granted under the Mexican grant, and until the validity of such grant has been determined, no rights could be acquired adversely to the United States. The rights which the grantee had under the law prevailing in the ceded territory prior to the cession, remained unavailable without fault of the grantee until the establishment of the Court of Private Land Claims; and by the terms of the treaty as well as by the duty morally devolving upon it under the law of nations, the United States bound itself to protect and secure such property rights. Obviously the Act of 1866, which will be more fully discussed hereafter, permitting the acquisition of rights as against the United States or recognizing rights growing out of cus-

toms, could have no application to lands comprised within such grants, and as will be shown hereafter, has been invariably held to apply only to strictly public lands. The effect of the patent, therefore, aside from its operation as a confirmation of the grant itself, and of all the title acquired thereby from the government of Mexico, was to transfer to the grantee whatever property rights the United States acquired by the cession from Mexico.

The following authorities, it is submitted, fully bear out this contention.

In Beard v. Federy, 3 Wall. 478, the question involved was the effect of a patent granted by the United States upon the confirmation of the title to lands claimed under a Mexican grant, the confirmation having been made by a tribunal created for the purpose of settling such matters in the state of California. It is there said that the operation of a patent of the United States is that of a quit-claim or conveyance of such interest as the United States had in the land; and

> "In the second place the patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights and were entitled by the law of nations to protection in them to the same extent as under the former government. The treaty of cession also stipulated for such protection

The obligation to which the United States thus succeeded was, of course, political in its character, and to be discharged in such manner and on such terms as they might judge expedient. By the Act of March 3, 1851, they have declared the manner and the terms on which they will discharge this obligation. They have there established a special tribunal before which all claims to lands are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the government; authorized appeals from the decision of the tribunal first to the District Court and then to the Supreme Court, and designated officers to survey and measure off the land when the validity of the claim is finally determined. When informed by the action of its tribunals and officers that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is therefore record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico, that it was entitled to recognition and protection by the stipulations of the treaty and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government this record so long as it remains unvacated is conclusive, and it is equally conclusive against parties claiming under the government by title subsequent."

In Knight v. United Land Association, 142 U. S. 161, the question is again treated at length.

The question there arose as to the effect of the confirmation of the title of the City of San Francisco, as successor to the pueblo of that name, to certain tide lands, and in the course of an elaborate and exhaustive opinion, it is said:

> "The confirmation of the claim of the city necessarily took effect upon its title as it existed upon the acquisition of the country. In confirming it the United States, through its tribunals, recognized the validity of that title at the date of the treaty."

And the same principle is again in effect approved by the Supreme Court of the United States in a case involving the very lands described in the patent mentioned in the findings of the court in this case.

> Herrick v. Boquillas Land & Cattle Co., 200 U. S. 96.

Under these decisions a patent issued by the proper officers of the United States to lands embraced within a confirmed Mexican land grant, operates not only as a quit-claim, or conveyance of whatever interest the United States may have in the lands, but also as a confirmation and determination that title existed under such grant at the time of the acquisition of the territory. The title thus confirmed is the title as it existed at the time of the cession by Mexico, and conclusively determines its existence, as

against the United States and as against third persons not showing a superior right.

It is now the settled rule that a patent issued by the Land Department of the United States relates back to the inception of the title and cuts off all intervening claims.

In Sturr v. Beck, 133 U. S. 541, the question arose between the claim of a riparian proprietor and one claiming the right to use of water by appropriation; and it was there determined that the title of the riparian proprietor, which became complete by the issuance of patent, related back to the date of his settlement, which was the inception of his title, and that the rights of the intermediate appropriator were thereby divested. It was there said, quoting from Shepley v. Cowan, 91 U. S. 330:

> "The patent which was afterwards issued, relates back to the date of the initiatory act and cuts off all intervening claimants."

Applying the principle upon which this proposition was based, and bearing in mind that the primary effect of a patent issued upon the confirmation of a Mexican land grant, is to confirm the title to the grant from the date of the grant by the Mexican government, it would seem clear that the effect of the patent as a quit-claim likewise relates back to the inception of the title or at least to the time of the acquisition by the United States of whatever it may have had which was

susceptible of passing by quit-claim, and so to vest in the patentee all property rights obtained by the United States by the treaty as of its date.

III.

The patent issued by the United States conveyed to the appellant all rights which the United States may have had in the waters of the San Pedro river.

The ninth section of the Act of Congress of July 26, 1866, which has been the subject of discussion by so many courts and text writers, provides as follows:

> "Whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."
>
> Revised Statutes U. S., Sec. 2339.

The Act of July 9, 1870, provided:

> "All patents granted or pre-emption or homesteads allowed shall be subject to any vested and accrued water rights or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the preceding section."
>
> Revised Statutes of the United States, Sec. 2340.

The effect of these statutes has been definitely settled by this court, and the conclusion reached is that the provisions quoted were a voluntary recognition of a pre-existing right of possession, constituting a valid claim to the continued use and not the establishment of a new one.

Broder v. Water Co., 101 U. S. 274;
Atchison v. Peterson, 20 Wall. 507;
Basey v. Gallagher, 20 Wall. 670.

The rights referred to in the Act of 1866, reservation of which in patents was provided for in the Act of 1870, amount therefore to a mere recognition of such rights as were vested at the time the patent took effect. No right was thereby created, and if in fact none existed or had become vested at the time of the issuance of the patent or at the time it took effect by relation, the reservation in the patent was of no importance, because there was nothing to reserve.

It was long a vexed question whether a patent took effect from the date of its issuance or, by relation, from the date of the inception of the title which it confirmed; much discussion was had by the courts of the Pacific States upon that subject and a great variety of decisions resulted. But the question was definitely settled by the decision of this court in Sturr v. Beck, 133 U. S. 541, in which it was

held, as before stated, that the patent took effect from the very inception of the title.

Such has been the view taken of this case since its decision, by the courts and text writers.

Faull v. Cooke, 19 Ore. 455; 26 P. 662;
3 Farnham, Water and Water Rights, pp. 2048-2049, Sec. 658;
Kinney on Irrigation, sections 219-220.

Discussing the rights vested in the grantee under the various land grants from the United States, Mr. Kinney reaches this conclusion: that the United States as the proprietor of public lands has the same rights and property in the streams flowing through those lands, as would be possessed by any other riparian proprietor. In the absence of actual vested rights in waters, or of legislation annexing conditions or limitations to grants, the grantee receives not only the fee of the soil, but also as a natural incident thereto, the benefit of the streams which flow through it. If, therefore, the grantee secures his grant before any appropriations have been made of the waters that flow through the land granted, then all subsequent appropriations must be made subject to the water rights of the riparian owner.

Kinney on Irrigation, Sec. 188.

In Cruse v. M'Cauley, 96 Fed. 369, the subject was much considered, and Judge Knowles, after

quoting section 2339 of the Revised Statutes, says:

> "The practical construction of this statute has been that, as long as land belonged to the United States, the water flowing over the same was subject to appropriation for any of the purposes named when such appropriation was recognized by the local customs, laws or decisions of the courts. But if the water was not so appropriated when it flowed over the public domain, it was not subject to appropriation after the land over which it flowed became private property. Patents of the United States to lands contain this clause: 'Subject to any vested and accrued water rights, for mining, agriculture, manufacturing, or other purposes,' etc. Certainly this means subject to such water rights as existed at the time when the patent took effect. I have said that in this case it would be the date Chamberlain filed his declaratory statement. If a person receives a patent from the United States for land subject only to accrued water rights—that is, existing water rights,—and as an incident to, or a part of, this land, there is water flowing over the same or upon the same, he would have all the rights the United States had at that time. I do not think any state law or custom can take away such rights, except for some public purpose."

Applying the principle before discussed to the patent issued in this particular case, it would seem clear that the patent issued to the appellant's grantors, besides operating as a confirmation of the Mexican grant, effected also a con-

veyance of whatever rights the United States had in the granted premises, which by relation, took effect as of the inception of the title. As the inception of the title was before the United States acquired the ceded territory, the effect of this conveyance was to transfer to the patentee all rights acquired by the United States by the treaty of cession or which vested in them by operation of law at the time of such treaty. If, therefore, the government of the United States acquired any rights in the granted lands, or in the waters of the San Pedro river, those rights became vested in the appellant's grantors as of the date of the cession, and long prior to any rights claimed by the appellees, or by anyone claiming by virtue of appropriation. The patent of the United States therefore, operated not only as conclusive confirmation and determination of the validity and existence of the Mexican grant, but as a complete conveyance to the patentee of all right and interest of the United States without reservation or exception as of the time when the United States acquired such rights.

IV.

The Doctrine of Appropriation---Its Origin and Extent.

The so-called doctrine of appropriation, as that expression is used by the text writers and the courts in the states where it prevails, must not be

confused with the long pre-existing rules of law relating to the use of water for purposes of irrigation. The cultivation of lands by means of irrigation and the use of water for that purpose are older than recorded history. The code of Hamurabbi as translated by Dr. Summer and Mr. Ambrose, shows that a code of laws governing irrigation existed 700 years before Moses. And Herodotus, five centuries before the Christian era, dwells at length upon irrigation as practiced in the regions which he visited; but the doctrine of appropriation—that is the right to the use of water by mere priority of appropriation, or as the courts sometimes express it, "priority of time is priority of right"—is a distinctly American doctrine which arose in the mining regions of California following the exodus to that state in 1849, and succeeding years.

Mr. Justice Field, whose long residence in California, as well as his knowledge of conditions there existing and his great learning in the law, qualified him to speak on the subject, thus interestingly describes the origin of the doctrine:

> "The discovery of gold in California was followed, as is well known, by an immense immigration into the state, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open, by law, to occupation and settlement. Little

was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches and canons, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, such as placer mining, quartz mining and mining in drifts or tunnels. They all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention and they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the law-makers, as respects mining, upon the public lands in the state. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced.

But the mines could not be worked without water. Without water the gold would remain forever buried in the earth or rock. To carry water to mining localities, when they were not on the banks of a stream or lake, became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes, was recognized as having, to the extent of actual use, the better right. The doctrines of the common law respecting the rights of riparian owners, were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains. The waters of rivers and lakes were consequently carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through canons and ravines, to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist, from their obvious justness, for the security of these ditches and flumes, and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the state courts, and received their sanction; and properties to the value of many millions rested upon them."

Jennison v. Kirk, 98 U. S. Reports S. C., pp. 457-458.

Again in Atchison v. Peterson, 20 Wall. 507, the same learned justice again discussed the origin of the doctrine.

It originated in the customs of miners growing out of the peculiar conditions existing in California in what may be freely termed, the early days, not only for mining purposes but for agricultural and other purposes.

Basey v. Gallagher, 20 Wall. 670.

Mr. Pomeroy in his work on Water Rights concisely states the origin of the doctrine as follows:

> "From the time of the discovery of gold in California, the mining interests became, and for many years continued to be in that state, and still are in other Pacific states and territories, of paramount importance, to which agriculture, manufacturing, and all other industries were subordinated. The lands containing the minerals belonged almost entirely to the public domain of the United States. Vast numbers of immigrants poured over these mineral regions, settled down in every direction, appropriated parcels of the territory to their own use, and were prospecting and mining in every mode rendered possible by their own resources, under no municipal law, and with no restraint except that of superior physical force. 'The world has probably never seen a similar spectacle,—that of extensive gold fields suddenly peopled by masses of men from all states and countries, restrained by no law, and not agreed as to whence the laws ought

to emanate by which they would consent to be bound."

"In this condition of affairs, the miners themselves adopted certain 'mining customs' to which they yielded a voluntary obedience, and which were afterwards recognized and sanctioned by the legislation of the state and of congress." * * * "These 'mining customs' or rules were simple, and related to the acquisition of 'claims' to mineral lands and to water for the purposes of mining, and prescribed the acts necessary to constitute such an appropriation of a parcel of mineral land or portion of a stream as should give the claimant a prior right against all others, the amount of work which would entitle him to a continued possession and enjoyment, what would constitute an abandonment, and similar matters. In this proceeding we find the origin of the peculiar doctrines concerning water rights as settled in the Pacific communities. Water was an indispensable requisite for carrying on mining operations; a permanent right to use certain amounts of water was as essential as the permanent right to occupy a certain parcel of mineral land. The streams and lakes were all on the public domain. For their advantageous employment it was often necessary to divert water from its natural bed, and to carry it through artificial channels—'ditches' or 'flumes'—sometimes of great length and constructed at an enormous cost. There were no riparian owners or occupants except the miners, and the streams could be put to no beneficial use except for purposes of mining. From all these circumstances, and from the very necessities of the situation, it universally became one of the mining customs or regula-

tions that the right to use a definite quantity of water, and to divert it if necessary from these streams and lakes, could be acquired by prior appropriation."

"This doctrine, applied at first to the operations of mining, has been extended to all other beneficial purposes for which water may be essential,—to milling, manufacturing, agricultural, irrigating, and municipal purposes."

Black's Pomeroy on Water Rights, sections 13, 14, 15.

Mr. Kinney in his work on irrigation gives in picturesque language the origin of the doctrine of appropriation, and the situations out of which it grew. The length at which he treats the subject forbids quotation. But see:

Kinney on Irrigation, sections 100-103.

The courts of nearly all the western states, as shown by the authorities cited by these learned authors have similarly detailed the origin and growth of this doctrine.

As will be more fully discussed hereafter, the doctrine was limited in its application to public lands of the United States or waters upon public lands. It grew out of the necessities of the situation, was recognized by the courts of the arid states and the vast property rights which had grown with this doctrine as a basis, compelled recognition by congress. In this situation, the Act of Congress of July 26th, 1866 (now appear-

ing as section 2339 Revised Statutes of the United States), and the subsequent Amendatory Act of 1870, regulating the provisions of patents thereafter issued, were passed.

V.

The Act of Congress of 1866.

This act of congress was not the proclamation of the sovereign enacting law, but the alienation by its duly authorized representatives of property owned by the United States.

Neither the United States nor Mexico had at any time any vested right in water separate and distinct from the ownership of lands. The government's ownership depended upon its ownership of land, and was precisely the same as that of any other riparian proprietor. Logically and naturally the riparian owner has rights in the stream which flows through his lands and these logical and natural rights have been recognized but not created by the decisions which go to make up the common law. There is no necessity or occasion for a riparian proprietor to "appropriate." The act of appropriation, even as recognized in the arid and semi-arid states, is an act whereby one who has no interest in the water acquires an interest in it.

Laws may give individuals the right to appropriate, and in the absence of laws, such rights

have accrued out of custom, which rights were afterwards recognized or confirmed by law; but neither law nor custom can give to one citizen that which belongs to someone else. The first appropriators gave no thought to their right to use the waters of creeks or rivers. They found water and they needed it, and they used it just as they breathed the air and killed game. Had the lands through which such waters ran belonged to private individuals, no rights could have been acquired by such appropriators except by prescription or purchase or perhaps by estoppel; but, as a matter of fact all such lands were a part of the public domain, and the actual appropriation and use of such waters was not questioned by the government.

The government's right to such waters as has been said before, inhered in it, not as a sovereign, but as the owner of the riparian domain. It was fundamentally different from the rights of the sovereign over navigable rivers. Had the government foreseen the immense exodus into California upon the discovery of gold, it would probably have provided for the alienation of its right to the waters, and those rights to the waters would have been acquired directly from the government and would not have evolved out of mere user. Had this been so the doctrine of appropriation would never have been known.

The "necessities of the situation" so frequently

mentioned by the courts and text writers, must not be confused with the necessities of a mining country for water for mining or of an arid country for waters for purposes of irrigation. The "necessities" which gave rise to the law of appropriation arose not only from the imperative need of water but also and chiefly from the fact that the government had made no provision for an authorized acquisition of title to it. In the meantime large property interests had been builded upon the right to water appropriated by this custom. Congress thereupon enacted the act of 1866, and its effect was two-fold.

First: It was in the nature of a quit-claim, recognizing and confirming title to water in those who had already taken or appropriated it.

Second: It was in the nature of a grant conferring the title to the government's waters upon those who in the future should appropriate it in pursuance of the local customs, laws and decisions of courts.

Therefore, after the act of 1866, the right of the appropriator to the waters of the streams, whether the appropriation had been made prior or subsequent to the year 1866, was founded upon a title from the government the primary proprietor of the water appropriated. The government's grant as to waters appropriated before 1866, as has been said, was a mere recognition of a pre-existing right and was in the nature of a quit-

claim, while as to waters appropriated subsequent to such enactment it was analogous to the grant of government lands, under, we will say, the General Railroad Act of 1875. That such was the scope and effect of the Acts of 1866 and 1870 amendatory thereof has been frequently held:

Basey v. Gallagher, 20 Wall. 670;
Broder v. Water Co., 101 U. S. 274;
Lux v. Haggin, 69 Cal. 255;
Meng v. Coffey, 60 L. R. A. 910; 93 N. W. 713; 67 Neb. 500;
Black's Pomeroy on Water Rights, Sec. 30.

It will be observed, therefore, that every appropriator of water derives his title and must derive it, from or through the proprietor of the water, and that no title can be derived by an appriator except by prescription, or by the consent or grant of the former owner of such water, whether such owner be a private individual or a government.

Nor can any territorial or state government or congress itself grant to any appropriator of water, a right to such water if the right to it belonged to somebody else. The rights of the appropriator, far from being inconsistent with the rights of a riparian proprietor, depend fundamentally upon the recognition of the rights of the

riparian proprietor as the ultimate source of the title.

The United States government obtains its title to the waters which it grants by reason of its ownership of the riparian lands. Once owning the lands and using the waters, the government may say, as was said by the Act of 1866, that a person not a riparian proprietor, may acquire a title to its (the government's) water; but this right to confer upon its citizens the right to appropriate, is dependent upon the government's ownership of such waters, which, in turn, is dependent upon the government's ownership of the lands. When, therefore, as in this case, the government did not own the riparian lands, but prior to any act of appropriation such lands had been conveyed to a private citizen, this citizen as such riparian proprietor had the same right in the waters flowing through his land as the government had in the waters flowing through its lands, and the right to alienate or refuse to alienate such waters existed in such citizen and not in the United States government.

VI.

The common law doctrine of riparian rights was adopted by the first legislature of Arizona.

The act of congress creating the territory of Arizona continued in force the laws of New Mexico until the new territory should adopt its own laws. The first legislature of Arizona met in 1864 and among other things enacted a code of laws locally known as the Howell Code. The provision of this code which adopted the common law, reads as follows:

> "The common law of England so far as it is not repugnant to or inconsistent with the constitution and laws of the United States or the bill of rights, or the laws of this territory is hereby adopted and shall be the rule of decision in the courts of this territory."

In this statute is found no provision adopting the common law only so far as it might be applicable to local conditions, nor reserving to the courts of the territory any right to depart from the rules of the common law except so far as those rules might be inconsistent with express constitutional or statutory provisions.

Indeed the language of this statute does not differ in effect from a simple adoption of the common law, and had the statute read simply "the common law of England is hereby adopted and shall be the rule of decision in the courts of this

territory," its meaning would be no different from the meaning of the language as contained in the Howell Code. All common law rules must, of course, yield to statutory provisions repugnant to them, and the language of the statute as contained in the Howell Code is to be taken as meaning simply that the common law in its entirety was adopted, except in so far as it had been modified by the constitution or laws of the United States and the statutes of the territory of Arizona. No right is reserved to the courts to declare the common law inapplicable on account of unfitness to existing conditions in the territory nor to modify any common law rule to fit such conditions. It was a plain, unambiguous adoption of the common law, except in so far as its rules might be modified by the same code, and this of necessity, included the common law adoption of riparian rights.

As expressed by the Supreme Court of California:

> "The Act of 1850 adopts the common law of England; not the civil law; not the *jus commune antiquum*, or Roman 'law of nature' of some of the civil law commentators; nor the Mexican law; nor any hybrid system. And the expression 'common law of England' designates the English common law as interpreted as well in the English courts as in the courts of such of the states of the Union as have adopted the English common law. We cannot presume that the members

> of the legislature, even at that day, were utterly ignorant of the climate and soil of the country in which they lived. * * * Under these circumstances, we must believe if it had been intended to exclude the common law as to the riparian right, the intention would have been expressed."
>
> Lux v. Haggin, 69 Cal. 255, at page 384.

It must be borne in mind, however, as will be hereafter shown, that irrigation, or the use of water for irrigation, is not unknown to the common law and the reasonable use of water for that purpose by a riparian proprietor is recognized by the common law itself. It is simply the so-called doctrine of appropriation or the rule adopted in the western states that priority of appropriation gives priority to the use of water, that is unknown to the common law.

Keeping in mind the language used by the territorial legislature in adopting the common law, and the extent to which the right to use water for purposes of irrigation is consistent or inconsistent with common law rules, we will now examine the statutes contained in the Howell Code which are supposed to be, and which were held by the court below to be, repugnant to the rule of common law with reference to the rights of the riparian proprietor.

These statutes are:

Article 22, Bill of Rights, Howell Code:

> "All streams, lakes and ponds of water

capable of being used for the purpose of navigation or irrigation, are hereby declared to be public property, and no individual or corporation shall have the right to appropriate them exclusively to their own private use, except under such equitable regulations and restrictions as the legislature shall provide for that purpose."

Chapter 55, Howell Code:

Sec. 1. "All rivers, creeks and streams of running water in the territory of Arizona are hereby declared public, and applicable to the purposes of irrigation and mining, as hereinafter provided."

Sec. 2. "All rights in acequias, or irrigating canals, heretofore established shall not be disturbed, nor shall the course of such acequias be changed without the consent of such established rights."

Sec. 3. "All the inhabitants of this territory, who own or possess arable and irrigable lands, shall have the right to construct public or private acequias (canals) and obtain the necessary water for the same from any convenient river, creek or stream of running water."

Sec. 4. "Whenever such public or private acequias (canals) shall necessarily run through the lands of any private individuals not benefited by said acequias, the damages resulting to such private individuals, on the application of the party interested, shall be assessed by the probate judge of the proper county in a summary manner."

Sec. 5. "No inhabitant of this territory, shall have the right to erect any dam, or build a mill, or place any machinery, or open any sluice, or make any dyke, except such

as are used for mining purposes or the reduction of metals, as provided for in sections six and seven of this chapter, that may impede or obstruct the irrigation of any lands or fields, as the right to irrigate the fields and arable lands shall be preferable to all others; and the justices of the peace of the respective precincts shall hear and determine the questions relative to all such obstructions in a summary manner, and cause the removal of the same by order directed to the constable of the precinct or sheriff of the county, who shall proceed to execute the same without delay."

Sec. 7. "When any ditch or acequia shall be taken out for agricultural purposes, the person or persons so taking out such ditch or acequia shall have the exclusive right to the water, or so much thereof as shall be necessary for said purposes, and if at any time the water so required shall be taken for mining operations, the person or persons owning said waters shall be entitled to damages, to be assessed in the manner provided in section six of this chapter."

Sec. 17. "During years when a scarcity of water shall exist, owners of fields shall have precedence of the water for irrigation, according to the dates of their respective titles or their occupation of the lands, either by themselves or their grantors. The oldest titles shall have precedence always."

Sec. 25. "The regulations of acequias, which have been worked according to the laws and customs of Sonora and the usages of the people of Arizona, shall remain as they were made and used up to this day, and the provisions of this chapter shall be enforced and observed from the day of its publication."

VII.

The provisions of the Howell Code are not inconsistent with or repugnant to the rights of the riparian proprietor at common law.

The provision of the Howell Code adopting the common law, is entire and emphatic. It is that "the common law of England * * * is hereby adopted, and shall be the rule of decisions in this territory."

This did not simply establish a system of procedure according to the courts of the common law, but on the contrary it brought into full operation the common law which creates, defines, limits and extends the rights of persons and property. Only so far as the constitution and laws of the United States and statutes of the territory then existing were repugnant to or inconsistent with it, did this rule cease to be in force. The terms "repugnant" and "inconsistent" though not synonomous, are frequently used interchangeably.

Swan v. United States, 3 Wyoming 151; 9 Pac. 931 at p. 933.

Manifestly these terms are so used in the particular states under consideration, and the question is therefore, whether the various provisions of the Howell Code are so repugnant to the existence of the common law rule of riparian rights, as inconsistency or repugnancy is defined by the

courts, as to repeal by implication the rule of the common law regulating the rights of riparian owners.

It is a familiar rule that statutes in derogation of the common law must be strictly construed, and that the common law is not further abrogated by such a statute than the clear import of its language necessarily requires.

Shaw v. Railroad Company, 101, U. S. 557;
Fitzgerald v. Quinn, 109 N. Y. 441;
Brown v. Barry, 3 Dallas, 365.

It is also a settled rule of construction of statutes that courts do not construe a statute in such a way as to repeal by mere implication a rule of the common law, unless the implication is absolutely imperative.

Smith v. Loatsch, 114 Ill. 271; 2 N. E. 59.

And it has been held that where a statute has revised a whole subject, and its purpose is apparently to supersede the common law rule, the statute must be deemed a constructive repeal of the common law, because such must be presumed to have been the intent of the legislature. But, unless such intent is manifest, the repeal by implication cannot be inferred.

Jennings v. Commonwealth, 17 Pick. 80 at p. 82;
State v. Dalton, 114 S. W. Rep. 1132.

The rule with reference to implied repeals of rules of the common law is no different from the rule relating to implied repeals of statutes by later statutes, and that is that the later statute must be so repugnant to the common law or the earlier statute that both cannot stand, and if one may be construed as supplementing the other, or if both may be construed as still in existence, there is no repeal.

In Henderson's Tobacco, 11 Wall. 652, it is said:

> "Where the powers or directions under several acts are such as may well subsist together an implication of repeal cannot be allowed."

In Red Rock v. Henry, 106 U. S. 596, it is said:

> "The leaning of the courts is against repeals by implication, and if it be possible to reconcile two statutes, one will not be held to repeal the other."

The court then reviews briefly the former decisions of this court, and reaches this conclusion:

> "The result of the authorities cited is, that when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two acts are in irreconcilable conflict or unless the later statute covers the whole ground occupied by the earlier, and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest."

Guided by this rule, can it be said that there is such irreconcilable conflict in the provisions of the Howell Code quoted, and the rule of common law that both may not stand together?

It has sometimes been said that the doctrine of appropriation is wholly repugnant to the common law. But this means no more than that the doctrine of appropriation is unknown to the common law. It by no means follows that both the common law doctrine of riparian rights and the modern rule of appropriation may not both be in force. This subject was exhaustively considered by the Supreme Court of Nebraska and it was held by that court that the two doctrines were not irreconcilable in the sense that they might not both be in force and that in fact, both were in force in that state, the court saying:

> "The two doctrines of water rights—one the rule of priority of appropriation, and the other the common law doctrine of riparian ownership, whose basis is equality between all those who own lands upon the stream,—may, in our judgment, both exist at the same time, as both have existed in this state, as we shall endeavor hereafter to demonstrate. We have spoken of the common law rule, made so by the legislative adoption of the principles of common law when applicable and not inconsistent with the laws of the state. Valid vested rights have also been acquired by reason of the prior appropriation of the public waters of the state which have received sanction and recognition by the legislature and by the congress of the Unit-

ed States, which places the title of the appropriation on an equality with riparian owners. The fundamental hypothesis of prior appropriation of water for the development of the arid or semi-arid portions of the country, is the recognition of the right of the people or those desiring to appropriate, and apply to beneficial uses any unemployed waters of the natural streams, and that such rights, when so acquired, are to be determined according to the date of appropriation; priority of acquisition giving the better right. The two doctrines are not necessarily so in conflict with each other as that one must give way when the other comes into existence. The common law rule of riparian rights is underlying and fundamental, and takes precedence of appropriations of water if prior in time. The two doctrines stand side by side. They do not necessarily overthrow each other, but one supplements the other. The riparian owner acquires title to his usufructuary interest in the water when he appropriates the land to which it is an incident, and when the right is once vested, it cannot be divested except by some established rule of law. The appropriator acquires title by appropriation and application to some beneficial use, and of which he cannot be deprived except in some of the modes prescribed by law. The time when either right accrues must determine the superiority of title as between conflicting claimants."

Crawford Co. v. Hathaway, 67 Neb. 325;
93 N. W. 781;
Reported sub. nom. Crawford Co. v. Hall,
60 L. R. A. 889.

The same subject was considered by the Supreme Court of the state of Washington, and while it was held that the court recognized the existence in that state of the doctrine of prior appropriation, it was also held that the doctrine of riparian rights was likewise in existence, the court saying:

> "While the court recognized the existence in this state of the doctrine of prior appropriation, it nevertheless held that the plaintiff and plaintiff interveners, who settled upon their respective lands, and acquired their title thereto by complying with the laws of the United States, and appropriated and used the water of the stream for irrigation and domestic purposes, prior to the diversion by appellants, were entitled to have the stream continue to flow as it naturally flowed through or by their lands at the time their possessory rights attached. In other words, the court held that the respondents were entitled to the common-law rights of riparian proprietors, as against subsequent appropriators of the water, from the date of their occupancy, with intent to acquire the title of the government in pursuance of law. And this ruling of the trial court was not at variance with the rule repeatedy announced by this court, and the territorial Supreme Court except upon the question as to the date at which riparian rights become vested in lawful occupants of public land. That such rights, as well as the right of prior appropriation, have hitherto been recognized in

the decisions in this state, will be disclosed by an examination of the following cases:

Thorpe v. Tenem Ditch Co., 1 Wash. 566;

Ellis v. Pomeroy Improv. Co., 1 Wash. 572;

Geddis v. Parrish, 1 Wash. 587;

Crook v. Hewitt, 4 Wash. 749;

Rigney v. Tacoma Light & W. Co., 9 Wash. 576; 26 L. R. A. 425;

Isaacs v. Barber, 10 Wash. 124; 30 L. R. A. 665;

Benton v. Johncox, 17 Wash. 277; 49 Pac. 495; 39 L. R. A. 107 at p. 109.

In Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. Dak. 519, 91 N. W. 352, the subject was considered by the Supreme Court of South Dakota.

The question arose as to the respective claims of a riparian owner and an appropriator both claiming the right to use the water of a certain stream. A statute of that state in force prior to 1881, known as section 2771, provided in terms that the owner of land through which a stream of water flowed, should have substantially the rights pertaining to a riparian owner at common law and that statute is said by the court in that case to be "a concise statement of the common law doctrine applicable to the rights of riparian owners."

In 1881, a statute was enacted granting the right to one holding absolute title to mineral or agricultural lands, to use and enjoy the waters of streams or creeks for mining and agricultural purposes. It was held that this later statute provided for the appropriation of water and in effect established the doctrine of appropriation in that state; but that the provisions of section 2771, were still in force and governed the rights of riparian owners as against subsequent appropriators; and the court reached the conclusion which the Supreme Court of the United States had taken when considering the same statutes in Sturr v. Beck, 133 U. S. 541, to-wit: that both statutes were in force.

In 3 Farnham on Water and Water Rights, at page 2052, the author says:

> "Having now seen to what extent the doctrine of riparian rights has been modified or abrogated in the respective states, it may be profitable to consider how far the doctrines are necessarily antagonistic, so that the adoption of one destroys the other, or, on the other hand, how far both doctrines may exist in the same state at the same time."

After reviewing the authorities, he concludes:

> "As appears from the above principles, the law of the states in which riparian rights have not been abolished is, that so long as the land and water belong to the government, the first one who makes use of the water has the better right to it, of which he cannot be deprived by subsequent grant of the riparian

land to private owners; but that when the land along the stream passes into private ownership, the right to make appropriations of water ceases and all future acquired rights must be determined by the common law."

In Lux v. Haggin, 69 Cal. 255, the subject of the rights of appropriators and riparian owners is again exhaustively discussed.

The opinion in this case is itself a treatise upon the whole subject of water rights. It holds that riparian rights attach to lands, title to which was acquired prior to any appropriation, and in fact that the rights of riparian owners cannot be affected by subsequent appropriation, though a prior appropriator might acquire rights as against one subsequently acquiring ownership of riparian lands.

Thus, it will be seen, that in the state where the doctrine of appropriation originated, the two systems existed, and are not regarded as so irreconcilable that the establishment of one involves the destruction of the other.

Turning now to the provisions of chapter 55 of the Howell Code above set forth, which are claimed to be irreconcilable to the common law rule, it will be seen that they do not purport to cover the entire subject of the use of water for the purpose of irrigation.

The legislature declared that streams, lakes and ponds of water should be public property, and

granted to the inhabitants of the territory the right to construct public or private canals and obtain water for the purpose of irrigation from any convenient river, creek or stream of running water. They contain further provisions regulating the maintenance of ditches or acequias, and to some extent regulate the rights of appropriators as between themselves.

Passing for the moment the question whether the legislature had the power to declare public that which was essentially private, and whether these statutes are to be construed as affecting anything but waters upon the public lands of the United States, the utmost effect that can be claimed for them is that they establish as a part of the legal system of the territory, the doctrine of appropriation. They contain no words of repeal such as will be found in subsequent legislation, but only contain—giving the greatest effect that can be claimed—affirmative provisions establishing the right to appropriate waters for irrigation or other beneficial purposes and regulating in some respects the rights of persons so appropriating waters as against others, claiming by right of appropriation. But this, as has been seen, is not irreconcilable with the common law rule of riparian rights, and both might exist at the same time in the same jurisdiction. Such was evidently the legislative intent. No negative terms are used in these statutes which could be claimed

to destroy the common law right, and nothing is said inconsistent with the existence of the common law doctrine, at least as to riparian lands the ownership of which was acquired prior to any appropriation.

The subsequent legislation of the territory entirely corroborates this view, and is utterly inconsistent with any idea that these provisions of the Howell Code *ex propria vigore* were sufficient to operate as a repeal of the common law rule.

In 1885 the provisions of the Howell Code adopting the common law which had been carried forward into the compilation of 1877, as paragraph 3438, was amended so as to read as follows:

> "The common law of England so far only as it is consistent with and adapted to the natural and physical condition of this territory, and the necessities of the people thereof, and not repugnant to or inconsistent with the constitution of the United States, or bill of rights, or laws of this territory or established customs of the people of the territory is hereby adopted and shall be the rule of decision in all the courts of this territory."
>
> Act 68 Laws of Arizona, 1885.

By the legislature of 1887 the revised statutes of Arizona of 1887 were adopted. In that revision, the Act of 1885 was carried forward and became paragraph 2935 of that revision.

In addition, the Revised Statutes of 1887 in

terms abolished the common law doctrine of riparian rights.

> "The common law doctrine of riparian water rights shall not obtain or be of any force or effect in this territory."
>
> Revised Statutes of 1887, paragraph 3198.

This latter provision, of course, effectually abolished the common law rule for the future, and prevented the acquisition of riparian rights since that time.

The text writers upon the subject of water rights have classed Arizona as one of the arid states, where the doctrine of riparian rights does not exist to any extent. But it will be found upon examination that they base this view, and correctly, of course, upon this statute, totally abolishing said rights.

It is stated by the Supreme Court of the territory in its opinion in this case, that under the rule applicable to the construction of statutes, this later legislation would ordinarily have weight, and possibly controlling weight, on the side of the view that the common law doctrine of riparian rights had theretofore been recognized. But it was the view of that court that the provisions of the Howell Code above referred to, were so sharply in conflict with the common law doctrine of riparian rights that such recognition may not be presumed, and that therefore the later legislation in effect abolished nothing. But it would appear

from the opinion of the learned Supreme Court of the territory that it planted this opinion upon the erroneous idea that the doctrine of appropriation and the common law doctrine of riparian rights could not exist together. And this as has been shown by authorities above cited is not the correct view, for the doctrines have existed and do exist in many states, and, in the language of the Supreme Court of Nebraska in Crawford Co. v. Hathaway, *supra*, "stand side by side." Eliminate this erroneous premise from the opinion of the court below, and it would seem indisputable that when the legislature of the territory by the Act of 1885 modified the common law and by the Act of 1887 expressly abolished the doctrine of riparian rights for the future it impliedly recognized that common law riparian rights had previously existed, at least as against subsequent appropriators.

VIII.

The provisions of the Howell Code cannot be so construed as to deny riparian rights to those already owning riparian lands.

In considering this subject, we find light in the statutes and decisions of another of the so-called arid states.

The constitutional and statutory provisions of the state of Montana, are as follows:

Montana Constitution, Article 3, Section 15:

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, distribution or other beneficial use, and the right of way over the lands of others for all ditches, drains, flumes, canals and aqueducts necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to a public use."

Civil Code of Montana, 1895:

Sec. 1880. The right to the use of running water flowing in the rivers, streams, canyons and ravines of this state may be acquired by appropriation.

Sec. 1881. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose, the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact.

Sec. 1882. The person entitled to the use of water may change the place of diversion, if others are not thereby injured, and may extend the ditch, flume, pipe or aqueduct, by which the diversion is made, to any place other than where the first use was made, and may use the water for other purposes than that for which it was originally appropriated.

Sec. 1883. The water appropriated may be turned into the channel of another stream, and mingled with its waters, and then be reclaimed; but in reclaiming it, water already appropriated by another must not be diminished in quantity or deteriorated in quality.

Sec. 1884. In all cases where, by virtue of

prior appropriation, any person may have diverted all the water of any stream, or to such an extent that there shall not be an amount sufficient left therein for those having a subsequent right to the waters of such stream, and there shall at any time be a surplus of water so diverted, over and above what is actually used by the appropriator, such person shall be required to turn and to cause to flow back into the stream such surplus water, and, upon failure so to do within five days after demand being made upon him in writing by any person having a right to the use of such surplus water, the person so diverting the same shall be liable to the person aggrieved thereby in the sum of twenty-five dollars for each and every day such water shall be withheld after such notice, to be recovered by civil action by any person having a right to the use of such surplus water.

Sec. 1885. As between appropriators, the one first in time is first in right.

Other statutes follow, regulating the procedure of appropriation.

The effect of these statutes is to establish, as effectually as language can, the doctrine of appropriation. Mr. Pomeroy says that the legislation of this state is in complete derogation of the common law riparian rights. Yet Montana is classified by the text writers among those states where the modified doctrine of riparian rights prevails. It seems to be one of those state, like California, where both doctrines are in force.

Long on Irrigation, Sec. 10.

The effect of these constitutional and statutory provisions was considered at length by the Supreme Court of Montana, in Smith v. Denniff, 24 Mont. 22, 60 Pac. Rep. 398.

It was held in this case, that the state had assumed to itself the ownership of the rivers and streams of the state and had granted the right to appropriate such waters and that one who appropriates the waters in accordance with the statute, acquires title to the use of the water by virtue of the grant made by the state as owner of the water. But, says the court:

> "This privilege or right to appropriate the water of a stream can in any and every case be taken advantage of or exercised only by one who has riparian rights, either as owner of the riparian land, or through grant of the riparian owner."

Further on in the opinion, the court holds that by section 1880 *et seq.* of the Civil Code, the right is conferred upon any one to make a valid appropriation of water upon unsold state lands, "but such permission can and does only apply to lands owned by the state."

The court then considers, for purposes of illustration, every phase of the question of water rights, and every situation out of which any claimed right can arise, and reaches the conclusion that the right of appropriation, granted by the statutes of the United States extends only to

government lands, and the rights granted by the state statutes extend only to lands of the state, and that neither does or can affect the rights of prior riparian owners.

The question was again considered in the very recent case of Prentice v. McKay, 98 Pac. Rep. 1081 (decided Jan. 11, 1909, not at this writing officially reported), and the rules laid down in Smith v. Denniff were reiterated and approved.

IX.

Prior to the abolition in Arizona of the doctrine of riparian rights, the right of appropriation was limited to public lands and waters flowing through them.

The effect of the Act of Congress of 1866 is thus stated by a standard text writer:

> "But when the federal government, in the act of 1866, made provision for the sale of its lands to private owners, it provided that all sales should be subject to the existing rights of appropriators. It thereby impliedly, if not expressly, recognized the rule of riparian ownership as in force, and, when the titles of riparian owners attached, the common-law right with respect to the flow of the stream attached also, and could not afterwards be destroyed by legislation of congress, of the territorial legislatures, or of the state legislatures, or by the adoption of a state constitution. The only way in which this result can be avoided is by holding that the common law was not in force in the territory. The effect of the conclusion

that the riparian owners have vested rights cannot be escaped by a decision of the courts that they have no rights to the flow of the water, or that such rights are not property, because these are principles of the common law which are not subject to the dictum of any court. If, then, under the common law, the right to the flow of the stream is a property right, as already suggested, the only way to avoid upholding the riparian right, is to hold that the common law was not in force in the territory. But, as has been seen, congress, in the act of 1866, assumed that it was in force, and the presumption is that such law is in force in every territory which is settled by emigrants from common law states."

3 Farnham, Water and Water Rights, p. 2027; Sec. 652.

But in Arizona it is not necessary to indulge in any presumption that the common law was in force by reason of the settlement of emigrants from common law states, for the reason that the first legislature of that territory expressly adopted the common law. And except where the common law rule has been expressly abolished and the doctrine of appropriation substituted for it, which as we have shown, was not done in Arizona until 1887, or at least until 1885, the doctrine of appropriation and the rights recognized under that doctrine by the Acts of Congress of 1866 and

1870 are strictly limited to the public lands of the United States.

Curtis v. LaGrande Hydraulic W. Co., 20 Ore. 34; 10 L. R. A. 484;

Benton v. Johncox, 17 Wash. 277; 39 L. R. A. 107; 49 Pac. 495;

3 Farnham on Water and Water Rights, 2049; Sec. 659;

Black's Pomeroy on Water Rights, Sec. 30.

As the lands involved in this case were not public lands, it follows that no right can be claimed under the acts of congress referred to, nor were any such rights reserved by any language contained in the patent.

X.

The Common Law Doctrine of Riparian Rights.

The rights of a riparian owner at common law have been settled by a long course of judicial decisions. The extent of such right has been absolutely settled by courts and text writers.

The language of Chancellor Kent is most frequently cited as embodying a terse and accurate statement of the rule.

> "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands as it was wont to run

(*currere solebat*) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, *unless he has a prior right to divert*, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple, usufruct while it passes along. *Aqua currit et debet currere*, is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction and he must return it to its ordinary channel when it leaves his estate."

Pomeroy on Riparian Rights, Section 8;

Black's Pomeroy on Water Rights, Section 8.

The nature of this right is thus stated by Mr. Pomeroy:

"Although, as above stated, the riparian owner has no property in the water itself, but only a usufructuary enjoyment of it as it passes through or along his lands, yet it is not to be inferred that his right to have the stream flow in its natural channel, without diminution or alteration, is merely appurtenant to the estate, or conditioned upon his actual application of it to some beneficial use. 'By the common law,' say the court in California, 'the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it. The right in each extends to the natural and usual flow of all the water, unless where the quantity has been diminished

as a consequence of the reasonable application of it by other riparian owners for purposes hereafter to be mentioned.'

"A right to the flow of water, then, is a corporeal right or hereditament which passes by grant of the land over which it runs. It may be conveyed absolutely, or lost or acquired, either wholly or in part, by an adverse user, sufficiently long, exclusive, and notorious to furnish adequate grounds for presumption of a grant."

Pomeroy on Riparian Rights, Sec. 9;

Black's Pomeroy on Water Rights, Sec. 9.

Mr. Long in his work on irrigation thus characterizes the nature of the right:

"The right of a riparian proprietor to the flow of the water of the stream is held to be inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. It follows that the right is in no way dependent upon user. Use does not create the right, and disuse cannot destroy or suspend it. If the riparian proprietor does not care or need to use the water, he still has the right to have it flow in its accustomed channel, except as its volume may have been decreased by its reasonable use by upper proprietors. His right can be lost only by grant, condemnation or prescription. The statement made above, that the right is inseparable from the soil, must not be taken altogether without qualification, for, as just suggested, the right to use the water of a stream may be acquired, as against the riparian proprietor, by grant, condemnation or prescription."

Long on Irrigation, Section 12.

In Benton v. Johncox, 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107, the court quoting from Washburn on Easements and Servitude, says:

> "The right of enjoying this flow without disturbance or interruption by any other proprietor is one *jure naturae* and is an incident of property in the land, not an appurtenance to it, like the right he has to enjoy the soil itself in its natural state unaffected by the tortious acts of a neighboring land owner. It is an inseparable incident to the ownership of land, made by an inflexible rule of law, an absolute and fixed right and can only be lost by grant or adverse possession."

It is believed that the statement of these authors, and the numerous authorities cited by them, show that the rule is both firmly established and definitely determined, and no further argument in support of that view is necessary. To the uses of water incident to riparian ownership should be added, as will hereafter be shown, the right to the reasonable use of water for irrigation.

Bathgate v. Irvine, 126 Cal.; 58 P. 442.

XI.

The common law right of a riparian proprietor includes the right to the reasonable use of water for irrigation.

The uses of water, which are sometimes termed the natural wants of the people, are among those which the common law gave to the riparian pro-

prietors, such as use for drinking and domestic purposes. Whether irrigation is among the natural wants is not settled, though it has been so held.

Evans v. Merriweather, 4 Ill. 496.

But particularly in the arid and semi-arid regions it is uniformly held that the common law right of the riparian proprietor includes the right to divert the waters of the stream, to be used in irrigating riparian lands.

In Meng v. Coffey, 67 Neb. 500; 93 N. W. 713, 60 L. R. A. 911, it is said:

> "It is generally recognized that at common law a riparian owner may take waters from a stream for purposes of irrigation."

Citing,

Embree v. Owen, 6 Exch. 353;
Elliot v. Fitchburg Ry. Co., 10 Cush. 191;
Gillett v. Jackson, 30 Conn. 180;
Gould on Waters, Sec. 617.

In Long on Irrigation, the rule is thus stated:

> "A riparian proprietor has the right at common law to make a reasonable use of the waters of a natural stream for irrigation purposes. This principle is well established, both in England and the Atlantic states, as well as in the states of the arid region where the doctrine of riparian rights obtains. The general doctrine as to the right of a riparian owner to use the water of a stream for irrigation is the same in the arid states as in

moister regions, except that a somewhat more liberal policy as to the permissible extent of such use has been adopted in view of the greater need for irrigation in the arid region."

Long on Irrigation, Section 11, and cases cited in notes 7 and 8.

In further support of this view, see

Harris v. Harrison, 93 Cal. 676; 29 P. 325;

Bathgate v. Irvine, 126 Cal. 135; 58 P. 442;

Benton v. Johncox, 17 Wash. 277; 39 L. R. A. 107;

Lux v. Haggin, 69 Cal. 255; 10 P. 674;

Black's Pomeroy on Water Rights, Sec. 151.

Mr. Farnham in his work on Waters and Water Rights treats the subject at some length. Under the head of "Right to use water for irrigation," and after reviewing the English and American authorities, he concludes that the rule of the common law itself embraces the right of the riparian owner to use the water for purposes of irrigation, subject only to the limitation that such use shall be reasonable with reference to the rights of other riparian proprietors.

3 Farnham on Waters and Water Rights, Sections 599-601.

The consideration of this subject may not seem essential to the determination of this case. It is shown, however, by the findings of fact made by the Supreme Court of the territory that the flow of water in said river is not sufficient to irrigate all of the lands and premises belonging to the appellant which are susceptible of irrigation.

Transcript of Record, p. 72, folio 134.

It appears, therefore, that the appellant, if its rights as riparian proprietor include the right to use water for irrigation may rightfully apply to that purpose the entire flow of the stream.

Its right to the use of all the waters of the stream except as against the rights of other riparian proprietors, none of which are here involved, would follow from the mere fact of riparian ownership of the lands described. If, as some authorities hold, the riparian owner cannot be entitled to injunctive relief as against one unlawfully diverting the waters of the stream, unless damage be shown, it would follow from the facts found that the appellant is damaged in that the diversion deprives it of waters which it could apply to the irrigation of its own lands.

The conceded fact also that the appellant has need of all the waters of the stream for irrigating its own land, might be deemed an answer to what, but for the respect due to judicial tribunals, might be termed the hysterical apprehension

of some courts that the granting the relief sought by the appellant would cause the lands in the arid regions to revert to the desert, and that which has heretofore blossomed like the rose, to become a barren waste.

The development of the country would seem to require that the owners of lands most naturally adapted to cultivation with the least waste of the waters necessary for that purpose, should be entitled to as much consideration as those who seek to lay waste lands favored by nature in favor of those more distant from the source of the water supply.

As was said in Lux v. Haggin, 69 Cal. 255, at page 312, "It would hardly be a satisfactory reason for depriving riparian lands of all benefit from the flow that they would thereby become utterly unfit for cultivation or pasturage, while much of the water diverted must necessarily be dissipated."

XII.

The common law doctrine of riparian rights is not so unfitted to the natural conditions in the arid regions as to be wholly inapplicable.

In another portion of this brief authorities are cited to show that the use of water for purposes of irrigation is recognized by the common law and that an established element of the doctrine

of riparian rights is the reasonable use by riparian proprietors of water for that purpose.

All the writers upon the subject agree that in many of the so-called arid or semi-arid states, the doctrine of riparian rights has not been abolished, and still exists and is enforced by the courts, though usually in connection with the doctrine of appropriation which has been established by constitutional or statutory provision.

In Long on Irrigation, Section 10, it is said that the doctrine of riparian rights prevails in all the states and territories of the arid region, with the exception of Arizona, Colorado, Idaho, New Mexico, Nevada, Wyoming and Utah.

An examination of the authorities cited by the learned author will disclose that in these states and territories the common law doctrine is now repudiated by express statutes, with the exception of Nevada, where the legislative prerogative seems to have been assumed by the courts.

Another author classifies the states and territories above named as those in which the doctrine of prior appropriation is in general force, but adds:

> "Of these, however, Colorado, Idaho and Wyoming have constitutional provisions declaring such to be the paramount law, and in the other jurisdiction named, it is generally established by statute."

The statutes now in force in Arizona, and quoted in another portion of this brief, show that the doctrine of riparian rights is abolished by statute in that territory and the expressions of the writers on the subject of water rights are based upon the now existing statutory provisions.

In the absence of statutes expressly abolishing the doctrine of riparian rights, a few courts have assumed, some squarely and others by language which was unnecessary to the decisions of the cases before them, that the common law doctrine is so unfitted to the conditions existing in a particular jurisdiction as not to be applicable to it, nor to be adopted by the mere adoption of the rules of the common law.

The Supreme Court of Nebraska in an elaborately considered case, has considered the rule by which courts should be guided in determining whether a common law rule should be held to be modified by local conditions, and particularly with respect to the very question now involved. That court says:

> "What is needed in such cases is a sound and practical mode of applying the principles of the common law to the peculiar conditions of arid or semi-arid localities, not a sweeping act of judicial legislation requiring not a little supplementary legislation of the same oblique character. In a case like the one at bar, where but a few of the questions inevitably to arise could be involved, complete formulation of a system of rules would be

improper and impossible. But to abrogate the existing law as to riparian rights, and put anything less than an equally complete system in its place, would result in a condition of chaos far worse than the partial or local difficulties sought to be obviated. 'Where the precedents are unanimous in support of a proposition, there is no safety but in a strict adherence to such precedents. If the court will not follow established rules, rights are sacrificed, and lawyers and litigants are in doubt and uncertainty while there is no certainty in regard to what, upon a given state of facts the decisions of the court will be. If the common rule is inadequate, the proper course is by legislation.' Maxwell, Ch. J., in Wilson v. Bumstead, 12 Neb. 14, 10 N. W. 411, 412. Not only should the inapplicability of a common law rule be general, extending to the whole, or the greater part, of the state, or, at the least to an area capable of definite judicial ascertainment, to justify the courts in disregarding such rule, but we think, in view of the ease with which legislative alteration and amendment may be had, the power to declare established doctrines of the common law inapplicable should be used somewhat sparingly." * * *

Meng v. Coffey, 67 Neb. 500, 93 N. W. 713; 60 L. R. A., at pp. 912-913.

The court then reviews certain of its former decisions which to some extent abrogated rules of the common law, and continues:

"But while in those cases a single rule, part of no general system of modern application, was rejected, here the rules assailed are

results of a general doctrine and part of a complete system, and to overthrow them would leave the whole body of the law of waters unsettled and confused. The subject calls for legislative, not for judicial action. Black's Pomeroy Water Rights, Sections 162, 163.

"Nor do we believe that the common law rule of equality among riparian owners, administered liberally with respect to the circumstances of particular localities, is necessarily prohibitive of irrigation anywhere. If we bear in mind wherein the essential doctrine of the common law on this subject consists, we doubt whether a more equitable starting point may be found; and we are not alone in this view. Black's Pom. Water Rights, Sec. 163."

Meng v. Coffey, 67 Neb. 500, 93 N. W. 713; 60 L. R. A., at p. 913.

In 3 Farnham on Waters and Water Rights, page 2038, the author in a section devoted to the discussion of the reasons for modifying the common law rule, says:

"So far as these statements (referring to statements in decisions reviewed by the author) require a preservation of vested rights, they are in accord with justice and sound principle. A person is not deprived of any right or unfairly dealt with, if at the time of settling upon the public land located upon the bank of a stream, he has notice that improvements have been made by other persons upon the faith of their right to use water from the stream; and it is only just that the law should provide that the vested interests of the appropriator should be pro-

tected. This has been fully done by the Acts of Congress, but having been done, there is no necessity for the courts to say that the right of appropriation rather than that of riparian ownership shall continue to be the law of the state, unless it is done in such a way as to preserve vested riparian rights. If, as the Supreme Court of the United States held in Sturr against Beck, 133 U. S., 541, the right of riparian ownership attaches when a settlement is made upon public land lying upon the bank of a stream, the declaration that there are no riparian rights in the state, works a needless hardship upon the settler and one which cannot be obliterated by any system of justice."

In Lux v. Haggin, 69 Cal. 255, in discussing the applicability of the common law doctrine, the court combats the view that by reason of aridity of the soil the common law doctrine is inapplicable, using this language:

"Riparian lands are irrigated naturally by waters percolating through the soil and dissolving the fertilizing properties. This is sufficiently apparent from the consequences which ordinarily follow from a continual cessation of the flow of a stream. If, in accordance with the law, such lands may be deprived of the natural irrigation without compensation to the owners, we must so hold; but we fail to discover the principles of 'public policy' which are of themselves of paramount authority and demand that the law shall be so declared. (Page 309.)

"The aridity of the soil and air being made the test the greater the aridity the greater the injury done to the riparian proprietors

below by the entire diversion of the stream, and the greater the need of the riparian proprietor, the stronger the reason for depriving him of the water. (Page 311.)

"It would hardly be a satisfactory reason for depriving riparian lands of all benefit from the flow that they would thereby become utterly unfitted for cultivation or pasturage, while much of the water must necessarily be dissipated."

In Benton v. Johncox, 17 Wash. 277, 49 Pac. 495; 39 L. R. A. 107, the subject is considered at length. After calling attention to the decisions in some of the Pacific states and territories upholding the theory that the rules of the common law respecting the rights of private riparian owners are inapplicable to the conditions and necessities of the people of the particular localities where the cause of action arose, it is said that the legislatures of those states and territories have attempted to abolish the common law doctrine relative to private property and water courses and to riparian rights generally; and that such decisions are presumably in accord with the local statutes, although the reasons assigned by some of the courts appear to be that the rules of the common law were inapplicable by reason of the aridity of the soil and the consequent necessity for extensive irrigation.

After considering those decisions, the court says:

"But how can it be held that that which is an inseparable incident to the ownership of land in the Atlantic states and the Mississippi valley is not such an incident in this or any other of the Pacific states, we are unable clearly to comprehend. It certainly cannot be true that a difference in climatic conditions or geographical position can operate to deprive one of a right of property vested in him by a well settled rule of common law. The mere fact that the appellants will not be able to occupy or cultivate their lands as they heretofore have done unless they irrigate them with water taken from the Ahtanum river is no sufficient reason for depriving the respondents who settled upon that stream in pursuance of the laws of the United States, of the natural rights incident to their more advantageous location. The necessities of one man, or of any number of men, cannot justify the taking of another's property, without his consent, and without compensation. If it be true, as claimed by appellants, that, if the judgment of the court below is affirmed, their land will again become a barren waste, and cease to 'blossom as the rose', it is equally true that, if the waters of the river are diverted from its channel, the premises of the respondents will become unproductive and utterly worthless."

The court then quotes with approval the language of the court in Lux v. Haggin, *supra*; and also the language of the Supreme Court of California in Hill v. Smith, 27 Cal., at page 482.

In Crawford Co. v. Hathaway, 67 Neb. 325; 93 N. W. 781; 60 L. R. A. 889, the same rule is applied, the court quoting with approval the lan-

guage above set forth, from the cases of Benton v. Johncox and Lux v. Haggin.

XIII.

Decisions to the Contrary and Particularly the Arizona Decisions.

The decisions usually cited as sustaining the contrary rule are as follows:

Coffin v. Lefthand Ditch Co., 6 Colo. 443;
Drake v. Earhart, 2 Ida. 716;
Stowell v. Johnson, 7 Utah 215;
Moyer v. Preston, 44 P. 845; 6 Wyo. 308;
Clough v. Wing, 2 Ariz. 371; 17 Pac. 453;
Reno Smelting Co. v. Stevenson, 20 Nev. 269; 21 Pac. 317.

Most of these decisions, as shown by the citations from the standard works on the subject of water rights above cited, were based upon constitutional or statutory provisions, which, in terms, abolished the common law doctrine of riparian rights.

The case upon which most of the others are founded is Coffin v. Lefthand Ditch Company, 6 Colo. 443, which may be said to be the leading and pioneer authority in support of that view, and upon the reasoning of which the later decisions are largely based.

The case in 6 Colo., was pressed upon the attention of the court in Lux v. Haggin, 69 Cal.

255, and in its opinion in the latter case was commented upon at some length by the court.

See 69 Cal., pp. 351-352.

The court says at page 352:

> "In Coffin v. Lefthand Ditch Company, the appropriator was given the preference by virtue of certain statutes of the territory of Colorado passed in 1861, 1862 and 1864. It may be that in interpreting these statutes the court was somewhat influenced by the general proposition already laid down, or assumed in its opinion that in the absence of express statute the prior appropriator of water had the better right as against all the world. But the territorial statutes were so construed as to *give the right* to the prior appropriator." (The italics are the court's.)

The case of Reno Smelting Works v. Stevenson, 20 Nev. 269; 21 Pac. 317, does, it must be conceded, squarely sustain the doctrine of appropriation by reason of incompatibility with local conditions of the common law rule, and this even as against the statute adopting the common law as the rule of decision. Of this case, a learned author has said:

> "That is one of the most flagrant examples of judicial legislation that has ever been perpetrated. After the court had once committed itself to the doctrine of riparian rights and the legislature had expressly adopted it, by adopting the common law, the court deliberately states that that doctrine is not the rule of decision in the state, and thereby destroys the property right which every settler

along a stream in a state had acquired in the flow of water. If necessary to adopt the rule of prior appropriation, it may be done legally and without the necessity of the court making such a departure from precedent and judicial tradition as was done in that case."

3 Farnham on Water and Water Rights, 2039-2040.

In this connection it may not be amiss to quote somewhat from the opinion of the Supreme Court in Van Sickle v. Haines, 7 Nev. 249, at pages 285-286:

"'The common law of England so far as it is not repugnant to or inconsistent with the constitution or laws of the United States, or the laws of the territory of Nevada, shall be the rule of decision in all courts of this territory. Our state constitution adopted this, like all other laws of the territory, by section two of the schedule, which declares that all laws of the territory of Nevada in force at the time of the admission of the state, not repugnant to the constitution should remain in force until repealed by the legislature; hence although the common law might, in the opinion of judges, be inapplicable, still, if not in conflict with the constitution or laws of the United States, or the constitution or laws of Nevada, it must nevertheless be enforced.

"But suppose this decision should necessitate the adoption of the common law respecting the manner in which running water may be used by those having the right to it; although it may operate unjustly in some cases, still, as a general rule, none more just and reasonable can be adopted for this state. It is a rule which gives the greatest right to

> the greatest number, authorizing each to make a reasonable use of it, providing he does no injury to the others equally entitled to it with himself; whilst the rule of prior appropriation here advocated would authorize the first person who might choose to make use of or divert a stream, to use or even waste the whole to the utter ruin of others who might wish it."

True, this decision has long since been overruled by the court which rendered it, but its reasoning has never been answered.

The Arizona decision dwelt upon in the opinion of the Supreme Court of the territory in this case, is Clough v. Wing, 2 Ariz. 371.

This case was decided in 1888 after the passage of the Amendatory Act of 1885, before cited, which modified the statute of common law so as to adopt it only so far as it might be compatible with local conditions, and after the adoption of the statute of 1887, which absolutely abolished the doctrine of riparian rights.

The contest in that case was between two appropriators, each of the parties claiming the right to water in controversy, by appropriation only. The prior appropriator sought to enjoin the subsequent appropriator from diverting the waters of a certain creek, by which diversion he claimed to have been deprived of the use of water to which he was entitled under his prior appropriation.

The trial court found as a fact that there was

sufficient water for both parties, and this finding was sustained upon appeal.

It would seem that such a finding in such case put an end to the controversy, and the decree which was rendered by the trial court, and affirmed by the Supreme Court of the territory, necessarily followed.

The discussion of the doctrine of riparian rights was absolutely unnecessary to the decision of that case, and wholly foreign to any question involved in it. Moreover, it must be assumed that the court had in mind the statutes then in force, at least the statute of 1885, and its opinion, though dictum as far as the discussion of the doctrine of riparian rights was concerned, may well have been based upon those statutes.

The case of Hill v. Lenormand, 2 Ariz. 354, decided in the same year, and only a month prior to the decision in Clough v. Wing is instructive as to the effect to be given to the language used in the latter case. The same judges composed the court in both cases, and in Hill v. Lenormand the learned justice who wrote the opinion in the other case, concurred in the opinion of the chief justice.

In the latter case the controversy was between one claiming as a riparian proprietor and a prior appropriator, or one who had made his appropriation of the waters of the San Pedro river prior to the acquisition of title by the riparian owner.

It was held (in harmony with the doctrine advanced in this brief that prior to the statutes of 1885 and 1887, both doctrines obtained in Arizona), that the right of the riparian proprietor was inferior to that of the prior appropriator.

A reading of the opinion bears out the idea that where the rights of riparian owners were directly before the court, such rights were recognized as existing, and the determination hinged upon whether the right of the appropriator or the riparian owner was prior in point of time.

The question involved was thus stated by the court:

> "Does the ownership of these lands on both sides of the San Pedro river by the defendants give them the right to the usufruct of the waters as riparian owners and that too notwithstanding the prior appropriation thereof by plaintiffs?"

And answering the question thus propounded, the court says:

> "Riparian rights are the same here as elsewhere wherever they apply; but they do not apply where the rights of prior appropriators have intervened."

Continuing, the court says:

> "In the case at bar riparian rights do not apply. Here the defendants six or seven years subsequent to the appropriation of plaintiffs, bought the lands about two miles above plaintiffs, on both sides of the San Pedro river, and sought the usufruct of the

waters thereof, diverting the same by means of a dam, ditch, &c., thereby interfering with the vested rights of plaintiffs as prior appro p ators."

And further on in the opinion the court plants its decision upon the Act of Congress of July 26. 1866, and the Act of July 9, 1870, and the construction given to those acts by the courts of the Pacific states.

Reading these decisions together it would seem that until the decision of the present case by the Supreme Court of Arizona, that court had never held in a case where the question was squarely presented, that the doctrine of appropriation was the sole doctrine governing the use of waters in that territory and that riparian proprietors had no rights as such.

XIV.

Riparian rights which exist by reason of the adoption of the common law were not subject to future legislation.

The learned court below took the position that, assuming that the common law as to riparian rights was enacted by the statutes of 1864, adopting the common law, nevertheless such rights under the statute were not intended to be a riparian right in the sense that they might not be abrogated by future legislation. The court said:

"The limitation expressed in the Act can-

> not be construed as referring solely to the laws of the United States or of the territory in force at the time of the adoption of the statute."

The court quotes in support of this view from the opinion in United States v. Rio Grande Irrigation Co., 174 U. S. 702, in which this court says:

> "The unquestioned rule of the common law was that every riparian owner was entitled to the continuous flow of the stream * * * while this is undoubted and the rule obtains in those states in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion a state may change this common law rule and permit the appropriation of the flowing water for such purposes as it deems wise."

The statement of the law thus made by this court cannot be given the effect claimed for it by the learned court below. We may concede that every state has the right to change the rule governing the use of waters within its boundaries, and as this court said, we may concede arguendo that that right belongs to the legislature of the territory. This means that such a change may be made so as to affect future rights only. We do not interpret the decision as a holding by this court that a state or territory may by such legislation destroy rights already vested.

The legislature may abolish any existing rule

and substitute another for it, and the substituted rule will govern as to future acquired rights, but rights already acquired, amounting to vested rights in property, cannot be affected by the change in the law.

The effect of such a change is well stated in Crawford v. Hathaway, 67 Neb. 325; 93 N. W. 781; 60 L. R. A. 889, at page 903, as follows:

> "The irrigation act of 1889 abrogated in this state the common law rule of riparian ownership in water and substituted in lieu thereof the doctrine of prior appropriation This legislation could not and did not have the effect of abolishing riparian rights which had already accrued, but only of preventing the acquisition of such rights in the future."

XV.

Under the Mexican law the right of a riparian owner to the use of water was superior to that of a subsequent appropriator. Such right was preserved and guaranteed by the treaty of cession and could not afterwards be affected by territorial legislation.

The territory, within which the lands belonging to the appellant lie, was ceded to the United States by the Gadsden treaty so-called, ratified on June 30th, 1854. This treaty incorporated in it by reference certain provisions of the treaty of Guadalupe Hidalgo, which preserved the property rights existing within the ceded territory.

The provisions of those treaties bearing upon the questions involved in this case are as follows:

TREATY OF GUADULUPE HIDALGO, MAY 30, 1848.

"Article VIII.

"Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

"Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

"In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to its guarantees equally ample as if the same belonged to citizens of the United States."

GADSDEN TREATY, JUNE 30, 1854.

"Article V.

"All the provisions of the eighth and ninth, sixteenth and seventeenth articles of the treaty of Guadalupe Hidalgo, shall apply to the territory ceded by the Mexican republic in the first article of the present treaty, and to all the rights of persons and property, both civil and ecclesiastical, within the same, as fully and as effectually as if the said articles were herein again recited and set forth."

The effect of these provisions was to preserve inviolate the rights of property within the ceded territory, though the territory itself passed into the domain of the United States. This view is unquestioned and is conceded by the court below in its opinion.

Kinney on Irrigation, Sec. 292.

Whatever rights the predecessors in interest of the appellant had as riparian owners remained in them and passed to their grantees, and was not subject to be affected by future legislation. It remains to be seen, therefore, what rights as riparian owners they had at the time of the cession.

To this end we will examine first, the doctrine of the civil law; and second, of the Mexican law as it existed at the time of the Gadsden treaty.

XVI.

The Civil Law.

Mr. Ware in his work on Roman Water Law has compiled from the Imperial rescripts, the edicts and the interdicts of the praetors and from

the civilian writers the rules of the civil law relating to water rights.

Commencing with section 250, at page 101, of his work on Roman Water Law, and continuing to and including Section 286, at page 110, will be found those provisions relating to water rights under the Roman law.

It will be seen from an examination of such paragraphs that, while the Roman law recognized the right to the use of water for irrigation and encouraged such use in the interest of the development of agriculture, it nowhere recognized any doctrine like the modern doctrine of appropriation.

It treated the right to use water upon non-riparian lands in its relation to riparian lands, as a servitude, which might, and indeed, did, often exist, but which must be based upon a grant or upon prescription. Thus, in Section 250, from the Emperor Antonine to Martial, it is said:

> "If you have exercised the right of conducting a flow of water through Martial's property with his knowledge, you have in time acquired a servitude of a permanent character. If before the expiration of such time (ten years if he were present, and twenty if he were absent), the right has been forbidden you. Then your claim to be reimbursed for expenses incurred by you will be in vain, because the ownership of any improvements made on the lands of another, as long as it remains in the same state, belongs to the owner of the land."

Again, in Section 270, it is said:

> "The intent of the vendor and vendee of an estate must be inquired into as of the date of sale so that whether its possession remains with the vendee or lapses back, it may be certain that the water grant was made by the will of the one who owned it."

Again, in Section 272:

> "In the granting of a water right, not only must the consent be obtained of him who exercises the right, but also of him who owns the place (of origin), because although he may not be able to use the water, the entire right is liable to revert to him."

In Section 273, it is said that, if the place of origin from which the water is led, is owned by several, there is no doubt but that the consent of all must be obtained.

Again, in Section 286, it is said:

> "It has been correctly decided that water should never be conducted through stone conduits, unless the right was embraced in the grant of the servitude."

An examination of these sections discloses that it was assumed in all cases that the right to the use of water on non-riparian lands, the water being conducted through the lands of riparian owners, presupposed a grant of servitude from the owner of the place where the water originated, or the point of diversion, unless such right had been acquired by prescription. The idea of acquiring such a right by prescription is, of course, entirely

inconsistent with the acquisition of it by mere appropriation.

The true rule is undoubtedly as stated in a recent case:

> "The doctrine of the private ownership of the body of the water of running streams is not to be found in the common law nor in the civil law, but was originated in our mining states and developed there under the influence of the necessities of our miners, and later of farmers in the arid and semi-arid districts."
>
> Concurring opinion of Sedgwick, J., in Crawford Co. v. Hathaway, 67 Neb. 325; 60 L. R. A. 889, at page 910.

By the law of France substantially the common law doctrine of riparian rights is established:

> "Celui qui a une source dans son fonds, peut en user a sa volonte, sauf le droit que la proprietaire du fonds inferieur pourrait avoir acquis par titre ou par prescription. Celui dont la propriete bord une eau courante, autre que celle qui est declaree dependance du domaine publique, par l'article, etc., peut s'en servir a son passage pour l'irrigation de ses proprietes. Celui dont cette eau traverse l'heritage, peut meme en user dans l' intervalle qu'elle y parcourt mais a la charge de la rendre, a la sortie de ses fonds, a son cours ordinaire."
>
> Code Napoleon, Art. 640-641-644.

XVII.

The Mexican Law.

Hall's Mexican Law, commencing with section 1362, at page 400, and continuing through chapter I following, treats extensively of the rights of riparian proprietors, and shows that the rights of riparian proprietors, and their corresponding duties, were little, if any, different under the Mexican law, from the rights and duties of such proprietors at common law.

Thus, section 1375, prescribes the duty of the upper proprietor toward the lower, substantially as at common law, giving to the upper proprietor, however, the right to use the waters to a reasonable extent for purposes of irrigation.

Section 1381 provides for the acquisition by third parties of title by grant or prescription, to the use of the waters of a stream.

Section 1395 limits the right of the upper proprietor to deprive the lower of the use of the water, "save inevitable loss caused by irrigation."

Section 1397 provides that a riparian owner cannot, without the consent of other riparian owners interested, concede to a third party the right to the use of water to the injury of other riparian proprietors.

The subject is treated exhaustively in Lux v. Haggin, 69 Cal. 255. Its length precludes quota-

tion. It will be found at pages 313 to 340, inclusive.

Without attempting any exhaustive analysis of this opinion, the following rules may be deduced from it:

First: That by the law of Mexico, the running waters of California were not dedicated to the common use of all the inhabitants, in the sense that individuals could not acquire an exclusive right to their use.

That the right of appropriation may be granted, and, in fact, did exist, but not the right to appropriate waters as against a prior riparian owner. The most that can be said is, that the right of appropriation did exist to some extent, but in conjunction with, and, as to prior riparian owners, entirely subordinate to the doctrine of riparian rights.

At page 317 it is said:

> "The common use of the waters it would seem, existed only while they continued to flow in and constitute a portion of the river. But under the Mexican law an exclusive use of parts or the whole of the waters of a river might be legally acquired by individuals."

Second: That the rights of riparian owners were not subordinate to any such common use; furthermore that the only exclusive use of the waters recognized by the Mexican law was that of

the riparian proprietor. For, says the court, at page 324:

> "Conceding the provisions of the Civil Codes (of Mexico) of 1870 and 1884, to be declaratory of the law as it existed when California was ceded to the United States, they do not confer nor recognize any inherent vested rights enforceable in the courts in others than riparian proprietors to the use of any portion of the waters of a stream nor any right except as to those who actually appropriated waters in the manner and on the conditions prescribed by the laws."

This case may, therefore, be summarized as holding that under the Mexican law the rights of riparian proprietors were substantially as at common law, and were superior to the rights of appropriators, at least where the riparian ownership was vested before appropriation. But as against riparian proprietors, whose rights accrued subsequently, the acquisition of the right to the use of water by appropriation, was recognized. This case and the rules it lays down are treated at length by Mr. Kinney in his work on irrigation, and the result of this decision and of other decisions on the subject are summed up by him as follows:

> "From the previous sections it is evident that the laws governing private rights in waters differed very little under Mexican rules at the time when the Southwest was ceded to the United States from those in force in California at the present time. The

law of appropriation for beneficial purposes was known and recognized as authority, and the same is also true respecting the law of riparian rights. There were in Mexico prior to the cession of California the two systems separate and distinct that we find now under the law of that state. The Mexican law as it existed at the time of the cession of California recognized an inherent and vested right in riparian owners to the use of the waters of a stream; and also recognized a vested right in those who had actually appropriated the waters in the manner and under the conditions prescribed by the laws of that country. When the territory of the Southwest was transferred to the United States by the treaty of Guadaloupe Hidalgo in 1848, and became subject to the laws of this government, and finally to the laws of the respective states and territories organized out of the same, the existing laws regarding private interests in and to the waters of streams and lakes were not found to be materially in conflict with the laws of the United States, or those finally adopted by the several states and territories. So, in the change from the Mexican laws to those of the United States few obstacles were thrown in the way as regards water and other property rights of persons who were grantees of the Mexican government to certain lands included within this tract, prior to the time of the treaty, and who claimed rights in the waters of flowing streams by virtue of their riparian ownership. Also those persons are protected who were actually at the time of the treaty appropriating the water to some beneficial use or purpose by diverting.

"It is not our purpose to discuss the ques-

tion as to what result might have followed had the laws of Mexico respecting water rights at the time of the treaty been radically different from those in force in the United States. However, we will say that if under the Mexican laws vested rights in the use or ownership of water or other property rights of such a nature as to have been inconsistent with the property laws of the United States or of the several states had grown up it is obvious that under the law of nations, and the terms of the treaty by which this territory was transferred, respecting vested rights, the several states under whose respective jurisdictions these water and other property rights came would have had no power to destroy them without just compensation. The stipulations in the treaty were that actual *bona fide* grantees of the Mexican government shall continue to be owners of their respective tracts, although the territory had passed into the domain of the United States; and that the vested rights in property should be respected by the United States government."

Kinney on Irrigation, Sec. 292.

If, as Mr. Kinney states, and as is clearly shown in the opinion of Lux v. Haggin, the Mexican law at the time of the cession was substantially the same as the law existing in California at the present time, and at the time of the decision in Lux v. Haggin, it is simply, as stated in previous portions of this brief, that the two doctrines of common law riparian rights and of appropriation exist together, and that the rights of parties

are determined according to the time at which such rights accrued. If at the time of the cession the ownership of the lands had vested, the right of the riparian owner, substantially as at common law, was superior to that of any subsequent appropriator. The rights of the appropriator only existed as against the owner of riparian lands subsequently acquired. Such is the view of Mr. Pomeroy, for, in discussing the question of riparian rights under Mexican grants, he says:

> "The question of priority between such a grantee and a person who has appropriated the waters of the stream before his grant was confirmed by the United States authorities must depend, we apprehend, upon the legal effect given to the confirmation. Does the confirmation relate back to the date of the treaty, so that the grantee is regarded as deriving his title directly and holding it continuously from the Mexican government; or, does the confirmation operate only from its own date, so that the grantee is regarded as deriving and holding his title immediately and directly from the United States, in pursuance of an executory agreement with Mexico?"
>
> Pomeroy on Riparian Rights, Sec. 42;
>
> Black's Pomeroy on Riparian Rights, Sec. 43.

It has been shown by the authorities cited in an earlier portion of this brief that by various decisions of this court it has been settled that such confirmation does re-

late back to the date of the grant and that the owner of the granted lands is regarded as holding his title continuously from the Mexican government. The question therefore that Pomeroy declines to consider, being settled, his conclusion as to the relative rights of the parties follows.

The view here contended for is supported by other decisions in the state of California.

In Pope v. Kinman, 54 Cal., page 3, the controversy was between the owner of a Mexican land grant and a subsequent appropriator.

It was said that under settled principles both of the civil and common law, the riparian proprietor has the usufruct in the stream as it passes over his land, and the rights of the owner of the Mexican grant as riparian owner were held to be superior to those of the appropriators.

Both doctrines have been recognized as being in force in California, and the courts of that state have frequently been called upon to adjudicate the respective claims to the use of water between riparian owners and appropriators. As an example see Rameli v. Irish, 96 Cal. 214.

A riparian proprietor may also claim the use of water as an appropriator in addition to his rights as riparian owner and such rights may be affirmed by judicial decree.

Van Bibber v. Hilton, 84 Cal. 585;

Nesalhous v. Walker, 45 Wash. 64; 88 P. 1032.

XVIII.

The nature of the grant shows that it was the intention of the Mexican government to convey to the grantee the right to use the waters of the river.

The grant conveyed a strip of land 1⅛ miles in width on each side of the San Pedro river. The river, while an essential part of the description of the grant, was not primarily used in the description as any natural monument to which the description might have been tied. Its function was far more important. It was the pre-existing element in determining the selection of the tract to be granted. It was its presence alone which made the land desirable as the subject matter of a grant. The tract conveyed was along both sides of this tortuous stream, winding and turning with the natural course of the waters, the obvious intent of both grantor and grantee being respectively to convey and to acquire lands which were valuable and desirable solely because bordering upon the stream. It seems unreasonable to suppose that the Mexican government, long before the doctrine of appropriation had been thought of, in conferring this governmental favor, should have conveyed the lands and withheld from the grantee the right to use the water, which was essential to the very life of the soil. Such a construction of the terms of the grant would be as unsupported by precedent and as

void of justice as was Portia's interpretation of Shylock's bond.

XIX.

In any event upon the facts found by the Supreme Court of the territory, the judgment cannot be sustained.

The facts found by the Supreme Court of the territory show that in the year 1877 certain persons entered upon the appellant's premises and constructed a canal or ditch. Subsequently this ditch was extended to a point about seven miles north of the northern boundary of appellant's grant; but this extension was thereafter abandoned and disused except by the defendant J. N. Curtis, for the irrigation of a small tract of land.

Subsequently the dam constructed for the purpose of developing water into the ditch was destroyed, a new one constructed in 1903, and this in turn was washed out in the winter of 1903 and 1904. [Transcript of Record, pages 73-74; fols. 134-136.]

In December, 1904, the defendants, among whom were the appellees, entered upon the appellant's premises, without its consent and sought to rebuild the dam and portions of the ditch which had been washed [illegible].

In the February following this action was commenced.

It is found by the court that the entry upon the

appellant's premises was without its consent, hostile to its interests, and under threats that the diversion of the waters would be continuous and uninterrupted under claim of right.

The court further found that the acts of the appellees will "prevent the waters from flowing along or over the land of the appellant, where they would naturally flow, and that the defendants will thereby acquire an easement over the plaintiff's lands and the right as against the plaintiff to continue the said diversion and will cause great and irreparable injury to the plaintiff." [Transcript of Record, page 75, fol. 138.]

The effect of the decree entered in the District Court and affirmed by the Supreme Court, is to permit the appellees to enter upon appellant's lands at will, construct ditches and dams, acquire an easement without compensation and cause it irreparable injury and damage. That no such right exists is deemed too clear to require extended discussion. That the domain of the appellant may not thus be invaded and its property taken without compensation is practically beyond dispute.

> 3 Farnham on Water and Water Rights, p. 1956, sec. 624.

It has been decided that any one owning and in possession of property has the right to prevent the entry of another for the purpose of construct-

ing a ditch by any degree of force necessary short of taking human life.

Johnston v. Meaghr, 14 Utah 426; 47 Pac. 861.

Statutes providing for the acquisition of the right to the use of water by appropriation do not authorize and cannot authorize one person to go upon the private property of another for the purpose of making an appropriation, except by condemnation proceedings.

Prentice v. McKay (Mont.), 98 Pac. Rep. 1081.

The decree in this case not only violates every settled rule of property rights, but its effect is to permit the appellees to trespass unlawfully upon appellant's lands and to acquire rights, and cause damage without compensation. If this may be done by the appellees, it is conceivable that any number of persons may acquire like rights; and the total destruction of the value of appellant's property can be brought about, and this without compensation, and regulated by no rule, except the will of those desiring to divert the waters. That anything of this kind may be done, either by authority of statute or by force of judicial decree, is too monstrous for sober contemplation.

The authorities upon the question are uniform. But a single case can be found to the contrary:

Yunker v. Nichols, 1 Colo. 553,

of which it has been said:

"It cannot be possible that any interests of the public or any citizen can be such as to justify the taking of the property of another citizen from him for public or private use, without making him compensation for the property taken, unless his property is a public nuisance or its destruction is absolutely necessary to avoid some great calamity. So that the taking is to be regarded not as that of a neighbor but as that of an overruling Providence to whose wishes he is bound to accede. The doctrine of the Colorado case has not found a foothold in other jurisdictions and is so opposed to fundamental and constitutional principles that it cannot be regarded as sound."

3 Farnham on Waters and Water Rights, pp. 1958-9, Sec. 624.

Conclusion.

The argument contained in this brief must be understood as limited to the particular tract of land comprised within appellant's grant. Appellant does not seek to overthrow the doctrine of appropriation in the territory of Arizona, nor to substitute for it the common law doctrine of riparian rights. Nor does it seek to bring about the calamitous consequences which are sometimes said to result from the general enforcement of the common law doctrine of riparian rights in the arid regions. It seeks only the rights which it claims were guaranteed by solemn treaty and by the statutes of the territory of Arizona when that territory came into existence.

No decree which may be rendered in this case will reach beyond the particular tract of land described in the complaint and the waters of the particular stream flowing through it.

If the result of a decree in appellant's favor should be that some non-riparian owners in the immediate locality of this tract should sustain injury, the power of the state to acquire by the exercise of the right of eminent domain, the waters belonging to the appellant, and thus throw them open to public use, affords an ample remedy. If such a result be desirable, it may be so obtained; "and if such course is taken the desired result may be attained without the necessity of ruthlessly destroying private rights or trampling under foot the fundamental principles which are the glory of the common law."

It is respectfully submitted that the judgment of the Supreme Court of the territory should be reversed, and the cause remanded to that court, with directions to cause a decree to be entered, granting to the appellant the relief prayed.

EUGENE S. IVES,

[redacted]

Attorneys for Appellant.

In the Supreme Court

of the

United States

OCTOBER TERM, 1906

BOQUILLAS LAND AND CATTLE COMPANY,
Appellant,
vs.
J. N. CURTIS, ET AL.,
Appellees.
No. 133

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

Brief of Appellees

H. L. PICKETT,
Attorney for Appellees.

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In the Supreme Court

of the

United States

BOQUILLAS LAND AND CATTLE COMPANY, *Appellant,* *vs.* J. N. CURTIS, ET AL., *Appellees.*	No. 133

Brief of Appellees

The only question presented by the assignment of errors is, does the common law doctrine of riparian rights prevail in Arizona in favor of the owners of land derived by grant from the State of Sonora prior to the Gadsden Purchase of 1854.

It is contended by appellant that the common law of England was adopted by the Territory of Arizona shortly after it was cut off from New Mexico and erected into a Territory, and carried with its adoption the riparian law of Great Britain and of the Eastern States of the United States of America. It therefore becomes necessary to examine what the laws of the Territory of Arizona were in 1864, and from that time down to the present.

In the old Howell Code, Compiled Laws of Arizona of 1864 and '71, compiled by Coles Bashford, on page 524, Section 7 of Chapter 61, reads as follows:

"The common law of England, so far as it is not repugnant to or inconsistent with the constitution and laws of the United States or the bill of rights or laws of this Territory, is hereby adopted, and shall be the rule of decision in the courts of this Territory."

Section 11 of the same Chapter provides, "That the bill of rights and Chapters numbered from 1 to 61 consecutively and described in the preceding Chapters, shall form and are hereby declared to be a code of laws for the Territory of Arizona to be known and designated as the Howell Code."

The same Section further provides that the whole 61 Chapters shall be treated as one entire law; and Section 12 provides "That nothing contained therein shall be construed to repeal any laws theretofore in existence in the Territory until the laws inconsistent therewith passed at that session of the legislature shall take effect, excepting that all provisions of the code shall

take effect and be in force from and after the 20th day of April, 1865.

The Act passing the code as an entirety was approved November 10th, 1864. (See page 525.)

It follows, then, that the common law of England, so far as repugnant to or inconsistent with the constitution and laws of the United States or the Bill of Rights or laws of the Territory, was not adopted.

Article XXII of the Bill of Rights, as found on page 25 of the Code of 1864-71 is as follows: "All streams, lakes and ponds of water capable of being used for the purpose of navigation or irrigation, are hereby declared to be public property, and no individual or corporation shall have the right to appropriate them exclusively to their own private use, except under such equitable regulations and restrictions as the Legislature shall provide for that purpose."

In Chapter 55 on page 501 of that Code, the Legislature adopted "such equitable regulations and restrictions" providing a complete system governing irrigating canals.

The 1st Section provides that "All rivers, creeks and streams of running water in the Territory of Arizona are hereby declared public, and applicable to the purposes of irrigation and mining, as hereinafter provided."

The 2nd Section provides that, "All rights in *acequias,* or irrigating canals, heretofore established shall not be disturbed, nor shall the course of such *acequias* be changed without the consent of such established rights."

The 3rd Section provides that "All the inhabitants of this Territory, who own or possess arable and irrigable lands, shall have the right to construct public or private *acequias* (canals), and obtain the necessary water for the same from any convenient river, creek or stream of running water."

The 4th Section provides that "Whenever such public or private *acequias* (canals) shall necessarily run through the lands of any private individuals not benefited by said *acequias*, the damages resulting to such private individuals, on the application of the party interested, shall be assessed by the probate judge of the proper county in a summary manner."

The 5th Section provides that "No inhabitant of this Territory shall have the right to erect any dam, or build a mill, or place any machinery, or open any sluice, or make any dyke, except such as are used for mining purposes or the reduction of metals, as provided for in sections six and seven of this chapter, that may impede or obstruct the irrigation of any lands or fields, as the right to irrigate the fields and arable lands shall be preferrable to all others; and the justices of the peace of the respective precincts shall hear and determine the questions relative to all such obstructions in a summary manner, and cause the removal of the same by order directed to the constable of the precinct or sheriff of the county, who shall proceed to execute the same without delay."

Section 7 provides that "When any ditch or *acequia* shall be taken out for agricultural purposes, the person or persons so taking out such ditch or *acequia* shall have the exclusive right to

the water, or so much thereof as shall be necessary for said purposes, and if at any time the water so required shall be taken for mining operations, the person or persons owning said water shall be entitled to damages, to be assessed in the manner provided in section 6 of this chapter.

Section 17 provides that, "During years when a scarcity of water shall exist, owners of fields shall have precedence of the water for irrigation, according to the dates of their respective titles or their occupation of the lands, either by themselves or their grantors. The oldest titles shall have precedence always."

Section 25 provides that "the regulations of *acequias*, which have been worked according to the laws and customs of Sonora and the usages of the people of Arizona, shall remain as they were made and used up to this day, and the provisions of this chapter shall be enforced and observed from the day of its publication."

Other sections of the Act provide for the appointment of overseers of *acequias* and for the enforcement of the provisions of the chapter.

These provisions, we contend, are wholly inconsistent with the common law doctrine of riparian rights, for as said by the Supreme Court of Utah in *Stowell vs. Johnson*, 26 Pacific, 290, "Riparian rights have never been recognized in this Territory or in any State or Territory where irrigation is necessary; for the appropriation of water for the purpose of irrigation is entirely and unavoidably in conflict with the common law doctrine of riparian proprietorship. If that had been recognized and applied in this Territory it would still be a desert, for a man owning ten

acres of land on a stream of water capable of irrigating one thousand acres of land or more near its mouth, could prevent the settlement of all the land above him, for at common law the riparian proprietor is entitled to have the water flow in quantity and quality passed his land as it was wont to do when he acquired title thereto, and this right is entirely irreconcilable with use for water for irrigation. The Legislature of this Territory has always ignored this claim of riparian appropriators and the practice and usages of the inhabitants have never considered it applicable and have never regarded it."

Certainly the latter clause of Article XXII of the Bill of Rights as found on page 25 of the Howell Code providing that no individual or corporation shall have the right to appropriate streams, lakes, etc., exclusively to their own private use, is inconsistent with the common law riparian rights as contended for by appellant, as also with the provision in the third section of Chapter 55, Howell Code, which gives to all the inhabitants of the Territory who own or possess arable or irrigable lands the right to construct either public or private canals and obtain the necessary water for the same from any convenient river, creek or stream of running water, for irrigation purposes, and it is repugnant to the fifth section, which provides that no inhabitant of this Territory shall have the right to erect any dam, etc., that may impede or obstruct the irrigation of any lands or fields, as the right to irrigate the fields and arable lands shall have preference to all others.

These provisions as found in tne Howell Code were carried into the Compiled Laws of 1877 bod-

ily, and continued in force until 1885, when the statutes adopting the common law were changed, and read as found in the Revised Statutes of 1887, Paragraph 2935.

On March 10th, 1887, Section 3198 of the Revised Statutes of 1887 was passed, which declares the common law doctrine of riparian water rights shall not obtain or be of any force or effect in this Territory, but Chapter 55, as it originally appears in the Howell Code, page 501 *et seq.*, was retained in the Revised Statutes of 1887 and continued in force, and also retained and continued in force in the Revised Statutes of 1901, as also the Act of March 10th, 1887. (See Title 73, Chapters 1 and 2.)

The passage of the Act of March 10th, 1887, did not change the law as it was before, but as said by Mr. Justice Brewer in the case of the United States vs. The Rio Grande D. & I. Co., 174 U. S. 705, was rather a voluntary recognition of the pre-existing right of possession constituting a valid claim to its continued use (of water) than the establishment of a new one.

In *Clough vs. Wing*, 17 Pac., 453, the question to be decided in this case came squarely before the Court, and it was there held that the common law doctrine of riparian rights would not apply in this Territory, and never had done so, either in New Mexico or Arizona or any of the Spanish provinces of America, and says that the common law rule had been unknown, and that the law never has been nor is now suited to the conditions that exist here so far as the same applies to the uses of water.

The opinion of the Court in this case is so able and so exhaustive of the subject, that we quote the following: "From 'time whereof the memory of man runneth not to the contrary', the rights of riparian owners were settled in the common law; and the right to appropriate and use water for irrigation has been recognized longer than history, and since earlier than tradition. Evidences of it are to be found all over Arizona and New Mexico in the ancient canals of a prehistoric people, who once composed a dense and highly civilized population. These canals are now plainly marked, and some modern canals follow the track and use the work of this forgotten people. The native tribes, the Pimas and Papagoes and other pueblo Indians, now, as they for generations have done, appropriate and use the waters of these streams in husbandry, and sacredly recognize the rights acquired by long use, and no right of a riparian owner is thought of. The only right in water is found in the right to conduct the same through their canals to their fields, there to use the same in irrigation. The same was found to prevail in Mexico among the Aztecs, the Toltecs, the Vaquis, and other tribes at the time of the conquest, and remained undisturbed in the jurisprudence of that country until now. It existed, also, in Peru, though there the appropriation was by the state, which constructed and maintained the canals so as to provide water for the use of the tillers of the soil. The Spanish conquerors brought the same ideas with them from Spain, where they prevailed then as now. Escriche, tit "Agua" §§111, IV., and "Acequia." 'The Lombard Kings, following the Roman practice, encouraged and extended irrigation in Italy.' From

Lombardy that art extended to France; while the Moors encouraged it in Spain, Sicily and Algeria.' Ency. Brit. (9th. Ed.) 'Necessity required it in the districts which comprise parts of the south of Spain, Portugal and Italy, including Sicily and Greece.' Id. Ruins of ancient irrigation works can be found in Spain. Id. In Egypt and in some parts of Persia, India and China this form of husbandry has been practiced from time immemorial, and still continues. Under the civil law, water was publici juris, and by that law the 'first person who chooses to appropriate a natural stream to a useful purpose has title against the owner of the land below, and may deprive him of the benefit of the natural flow of the water.' Per Denman in Mason v. Hill, 5 Barn. & Adol. 1.'

Thus we see that this is the oldest method of skilled husbandry, and probably a large number of the human race have ever depended upon artificial irrigation for their food products. The riparian rights of the common law could not exist under such systems; and a higher antiquity, a better reason, and more benificent results have flowed from the doctrine that all right in water in non-navigable streams must be subservient to its use in tilling the soil. Recognizing these principles, the act of Congress March 26, 1866, extended them over the public domain wherever applicable, and all patents (16 St. U. S. § 17) to land are subject to these rights to the use of water. By that act it is provided that: " 'Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of the Courts,

the possessors and owners of such vested rights shall be maintained and protected in the same.' * * * * * * * * *. Up to about a third of a century ago (1854) and but recently before this enactment (Howell Code 1864), the Territory of Arizona had been subject to the laws and customs of Mexico, and the common law had been unknown; and that law has never been, and is not now, suited to the conditions that exist here, so far as the same applies to the uses of water."

The most instructive as well as the fullest of all the cases where the question is thoroughly sifted, and the decisions of the various courts on the subject are reviewed, is the case of Willey vs. Decker, reported in 73 Pac. Rep., commencing on page 211. The learned judge there points out the difference between the rule prevailing in California, Montana and Nebraska, and the arid states of the west, and shows conclusively that those decisions do not and can not apply to Arizona and New Mexico. He also shows that the conditions and the necessities of this Territory are entirely different from those of Montana, Nebraska and California; and quoting from other decisions on page 216 rendered by the same Court, the learned judge who delivered the opinion says: "This use, and the doctrines supporting it is founded upon the necessities growing out of natural conditions, and is absolutely essential to the development of the material resources of the country. Any other rule would offer an effectual obstacle to the settlement of this region and render the land incapable of successful cultivation."

Had he been writing the opinion in a case before the Supreme Court of the Territory of Ari-

zona, his language could not have been more apt or more apropos to the conditions existing here.

He also in the case refers to the decisions of the Supreme Court of the United States, and to the Acts of Congress, recognizing the rights of early settlers to appropriate the waters of running streams. And referring to the customs of the people on page 218, he quotes from the Nebraska case cited by appellant, and says, "That the custom existed before the enactment of any irrigation statute, and where the custom had been so generally recognized as to have the force of law, it could only be regarded as a substantial adoption of the doctrine of the prior appropriation of water which obtains in the arid states immediately west of us."

He also calls attention to the fact that California, Montana and Nebraska are the only partially arid countries, and that the rule established in those jurisdictions do not and can not apply in what is known as the arid sections of the United States.

It will be observed that the argument of counsel for appellant is based entirely upon the decisions rendered in California, Montana and Nebraska, and that the great weight of authority is against the proposition contended for by him.

The establishment of the principle contended for by appellant would be equivalent to returning the arable and irrigable lands of Arizona to a desert condition, and the Court would hesitate long before it will subscribe to such a view of the law.

The earlier decisions in Nebraska and some of the other so-called arid states, took the position

contended for by plaintiff in *Willey vs. Decker, supra.* This is not surprising, as the judges who rendered those decisions were from east of the Rocky Mountains and imbued with the old idea of riparian rights known to the common law, but the tendency of all the modern decisions on the subject, as well as legislation both state and federal, has been in the other direction, and it is only necessary to cite this Court to the recent Acts of Congress not only recognizing the principle of appropriating water for irrigation and mining purposes in the arid states, but is lending its assistance in the most practical and efficient way by establishing reclamation districts and providing the means of conserving the waters of the various streams for that purpose.

The Supreme Court of the Territory of Arizona has construed, at different times, Article 22 of the Bill of Rights of the Howell Code, Chapter 25, and the subsequent acts of the Territorial Legislature in regard to irrigation and appropriation of water and has uniformly held that the common law doctrine of riparian rights does not, and has never existed in the Territory of Arizona.

Clough v. Wing, 17 Pac. 453.
Boquillas L. & C. Co. v. Curtis, et al. 89 Pac. 504.

The Construction of a statute of a Territory by the local Courts is of great, if not of controlling weight, with the Supreme Court of the United States.

Copper Con. Mg. Co. vs. Board of Equalization, 206 U. S. 474.

Lewis vs. Herrera, Receiver &c. 208 U. S. 309.
Sweeney vs. Lomme 22 Wall. 208.
Northern Pac. Ry. Co. vs. Hambly 154 U. S. 349.
Fox vs. Haarstick, 156 U. S. 674.
Whitney vs. Fox 166 U. S. 637.

As this Court said in the case of the Copper Queen Consolidated Mining Co. v. Board of Equalization of the Territory of Arizona, 206 U. S. 479: *"While this Court cannot refuse to exercise its own judgment it will naturally lean toward the interpretation of a local statute, adopted by a local Court."*

If it should be conceded for argument sake, that the common law doctrine of riparian rights ever obtained in the Territory of Arizona, it was abrogated by the Act of the Territorial Legislature of March 10, 1887 Revised Statutes of Arizona 1887, Section 3198, which reads as follows: *"The common law doctrine of riparian water rights shall not obtain or be of any force or effect in this Territory."*

As was said by this Court in the case of the United States vs. Rio Grande Dam and Irrigation Co. 174 U. S. 703: "A state may change this common law rule and permit the appropriation of the flowing water for such purposes as it deems wise. Whether this power to change the common law rule and permit any specific and separate appropriation of the waters of a stream belongs also to the Legislature of a Territory, we do not deem it necessary for the purposes of this case to inquire. *We concede arguendo* that it does."

If a state can change or abrogate the common law doctrine of riparian rights, why cannot a Territory? Can there be any valid reason given why a Territory has not the power to legislate upon all rightful subjects of legislation affecting its *very existence,* that a state has; unless its organic Act specially prohibits it from such legislation? If the legislature of Arizona had the power of adopting the common law, which was attempted by Section 2935 Revised Statutes of Arizona 1887, had it not also the power to abrogate it at any time? And did it not specifically declare by the Act of March 10, 1887, Section 3198 of the same Statutes that: "That the common law doctrine of riparian water rights shall not obtain or be of any force or effect in this Territory." If the common law doctrine of riparian water rights existed in the Territory of Arizona and was put into practice, all the waters of the Territory would be under the control of the riparian owners, which would result largely in a depopulation of the Territory, and rendering it a barren waste, fit only for the cactus and coyote. In other words, it is not adapted to the conditions existing in the arid region of the West and has never obtained in it. As stated by the Supreme Court of Utah in Stowell v. Johnson, 26 Pac. 290; 7 Utah 215: "At common law the riparian proprietor is entitled to have the water flowing in quantity and quality past his land as it was wont to do when he acquired title thereto, and this right is utterly irreconcilable with the use of water for irrigation." In the states of Colorado, Nevada and Wyoming, which constitute a very large portion of the arid region of the West, the Supreme Court has announced the same doctrine.

Coffin vs. Left Hand Ditch Co. 6 Col. 443;
Jones vs. Adams, 19 Nev. 79; 6 Pac. 442; 3 Am. St. Rep. 788.
Works vs. Stevenson, 20 Nev. 269; 21 Pac. 317; 4 L. R. A. 60. 19 Am. State Rep. 364;
Willey vs. Decker, 73 Pac. 211; 11 Wy. 460; 100 Am. St. 939.

It will perhaps, be argued by counsel for the appellant that prior to 1854, the time the United States acquired the strip of land known as the Gadsden Purchase from the Republic of Mexico, and in which the land grant of the appellant is situated, that the common law doctrine of riparian rights was in force in the state of Sonora, Republic of Mexico, was a vested right, and that the United States in acquiring the strip known as the Gadsden Purchase, acquired it with all its vested rights under the then existing Mexican law. Our contention is that the common law doctrine of riparian rights never existed in the State of Sonora, Republic of Mexico, from which the Gadsden Purchase was acquired. The case of Lux v. Haggin, 10 Pac. 675; 69 Cal. 255, and upon which the appellant chiefly relied in its brief on the hearing of this case in the Supreme Court of the Territory of Arizona, does not support Appellant's contention in this case. "The Court laid down as its general conclusion that: By the law of Mexico, the running waters of California were not dedicated to the common use of all the inhabitants in such sense that they could not be deprived of the common use." This general declaration is construed by the Court subsequently in its opinion as follows: "The waters of innavigable rivers, while they continued such,

were subject to the common use of all who would legally gain access to them for the purposes necessary for the support of life. But the Mexican government possessed the power of retaining the waters in their natural channel, or of conceding the exclusive use of portions of them to individuals or corporations upon such terms or conditions and with such limitations as it saw fit to establish by law." If this case correctly states the Mexican law in regard to the waters of innavigable rivers at the time of the Gadsden Purchase, it made the waters of such rivers a proper subject of legislative control, and in the transfer of that Purchase to the United States, there was necessarily a transfer of that legislative sovereignty to the United States. And hence, the United States, or its political subdivision, Arizona, had the power to pass laws regulating the use of the waters of such streams, declaring them subject to prior appropriation by individuals for irrigation, mining, etc., which it did in the Bill of Rights of the Territory, adopted by the first Legislature in the year 1864, Howell Code, supra., and the subsequent Acts of the Territorial Legislature.

The judgment of the Supreme Court of Arizona should be affirmed:

1st. Because Article 22 of the Bill of Rights as found on page 25 Compiled Laws of Arizona, 1864-71 being the first act of legislation of the Territory, provides as follows: "All streams, lakes and ponds of water capable of being used for the purpose of irrigation or navigation, are hereby declared to be public property, and no individual or corporation shall have the right to appropriate them exclusively to their own private

use, except under such equitable regulations and restrictions as the Legislature shall provide for that purpose." On page 501 same Compiled Laws, Section 1, provides that: "All rivers, creeks and streams of running water in the Territory of Arizona are hereby declared public and applicable to the purposes of irrigation and mining as hereinbefore provided." Section 3 provides that "All the inhabitants of this Territory, who own or possess arable and irrigable lands shall have the right to construct public or private acequias (canals) and obtain the necessary water for the same from any convenient river, creek or stream of running water." The Supreme Court of the Territory of Arizona has construed the foregoing statutes, from its earliest decisions to the present time, to mean that all the rivers, creeks and streams of running water, including lakes and ponds, in the Territory of Arizona are public property and capable of appropriation for irrigation and mining purposes, And not subject to the common law doctrine of riparian rights,—which has uniformly been declared by said Court never to have existed in Arizona.

2nd. Because if the common law doctrine of riparian rights ever existed in the Territory of Arizona it was abrogated by the Act of the Territorial Legislature of March 10, 1887, Revised Statutes of Arizona 1887, Section 3198. And the Supreme Court of the Territory so held in this case. 89 Pac. 507.

3rd. Because at the time of the acquisition of the Gadsden Purchase by the United States from the Republic of Mexico, the waters of innavigable rivers in Mexico were subjects of legislative con-

trol. So when the Gadsden Purchase was transferred to the United States, it carried with it as incident and appurtenant thereto, that legislative control over the waters of innavigable rivers. So, the United States, or its political subdivision, the Territory of Arizona, became vested with that sovereignty over such waters as Mexico possessed prior to that time. And hence the legislature of the Territory had the power to declare such waters public property, and to be subject to appropriation by individuals and corporations for irrigation and mining purposes.

4th. Because the common law doctrine of riparian rights is not adapted to the arid region of the West; but is wholly repugnant to and inconsistent with the appropriation of water for irrigation and mining purposes, and has never obtained in Arizona or any portion of the arid region of the West.

Respectfully submitted,

H. L. PICKETT,

Attorney for Appellees.

BEN GOODRICH,

Of Counsel.

BOQUILLAS LAND AND CATTLE COMPANY *v.* CURTIS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 133. Argued April 7, 1909.—Decided April 19, 1909.

Under § 3198, Rev. Stat. of Arizona of 1887, the common-law doctrine of riparian rights does not now obtain in that Territory, and, as held by the Supreme Court of the Territory, the doctrine of appropriation was recognized and to some extent in force prior to and since 1833 in the State of Sonora now a part of that Territory.

Confirmation of an estate does not enlarge it, and where the original Mexican title did not carry riparian rights the mere confirmation thereof by the United States does not give such rights to the confirmee.

The legislative act of Arizona, Howell's Code of 1864, c. 61, § 7, adopting the common law of England was merely the adoption of a general system of law in place of the Spanish Mexican general system which was simultaneously repealed, and the regulation of and rights to water were by the same act made subject to the natural and physical condition of the Territory and the necessities of its people; and this court sustains the Supreme Court of the Territory in its interpretations of the qualifications imposed on the general adoption of the common law in respect to the use of water.

The right to use water is not confined under the customary law of Arizona to the riparian proprietors. Where the riparian proprietor is entitled under a general statute to have the damages to his land taken for withdrawal of water by appropriators assessed, the decree below will not be disturbed because no provision was made for compensation, it appearing in this case that the objection was technical and the point was not discussed below

89 Pac. Rep. 504, affirmed.

THE facts are stated in the opinion.

Mr. Eugene S. Ives for appellant:

Riparian rights once vested are property rights and cannot be taken away except by the exercise of the right of eminent domain. Long on Irrigation, § 12; Black's Pomeroy on Water Rights, § 9; *Lux* v. *Haggin*, 69 California, 255; *Sturr* v. *Beck*, 133 U. S. 541; 1 Farnham on Water Rights, 282; *Benton* v. *Johncox*, 17 Washington, 277; *S. C.*, 39 L. R. A. 107; 61 Am. St. Rep. 912; *Clark v. Cambridge &c. Co.*, 45 Nebraska, 798; *S. C.*, 64 N. W. Rep. 239; *Yates* v. *Milwaukee*, 10 Wall. 497; *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U. S. 672; *Delaplaine* v. *Railway Co.*, 42 Wisconsin, 214; *Belle* v. *Gough*, 23 N. J. Law, 624; *Water Co.* v. *Raff*, 36 N. J. Law, 635; *Crawford Co.* v. *Hathaway*, 67 Nebraska, 325; *Bigelow* v. *Draper*, 6 N. Dak. 152; *S. C.*, 69 N. W. Rep. 570.

Appellant's ownership within the Mexican grant having been

continuous since the date of the grant the patent operated as a consummation of such title, and also as a quit-claim of whatever interest the United States acquired by the cession. *Beard* v. *Federy*, 3 Wall. 478; *Knight* v. *Land Association*, 142 U. S. 161; *Herrick* v. *Boquillas Land Co.*, 200 U. S. 96; *Sturr* v. *Beck*, 133 U. S. 541; *Shepley* v. *Cowan*, 91 U. S. 330.

The patent issued by the United States conveyed to the appellant all rights which the United States may have had in the waters of the San Pedro River. Revised Statutes U. S., §§ 2339, 2340.

The effect of these statutes has been definitely settled by this court, and the conclusion reached is that the provisions quoted were a voluntary recognition of a preëxisting right of possession, constituting a valid claim to the continued use and not the establishment of a new one. *Broder* v. *Water Co.*, 101 U. S. 274; *Atchison* v. *Peterson*, 20 Wall. 507; *Basey* v. *Gallagher*, 20 Wall. 670.

The common law doctrine of riparian rights was adopted by the first legislature of Arizona in the code of laws known as the Howell Code. Article 22, Bill of Rights, Howell's Code; Howell's Code, Chapter 55, §§ 1, 2, 3, 4, 5, 7, 17, 25.

The provisions of the Howell Code are not inconsistent with or repugnant to the rights of the riparian proprietor at common law. *Crawford Co.* v. *Hathaway*, 67 Nebraska, 325; *S. C.*, 93 N. W. Rep. 781; *Thorpe* v. *Tenem Ditch Co.*, 1 Washington, 566; *Ellis* v. *Pomeroy Improv. Co.*, 1 Washington, 572; *Geddis* v. *Parrish*, 1 Washington, 587; *Crook* v. *Hewitt*, 4 Washington, 749; *Rigney* v. *Tacoma Light & W. Co.*, 9 Washington, 576; *Isaacs* v. *Barber*, 10 Washington, 124; *Benton* v. *Johncox*, 17 Washington, 277; *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 15 S. D. 519.

Under the Mexican law the right of a riparian owner to the use of water was superior to that of a subsequent appropriator. Such right was preserved and guaranteed by the treaty of cession and could not afterwards be affected by territorial legislation. Kinney on Irrigation, § 292.

Mr. H. L. Pickett and *Mr. Ben Goodrich*, for appellees, submitted:

The common law doctrine of riparian rights does not prevail in Arizona in favor of the owners of land derived by grant from the State of Sonora prior to the Gadsden Purchase of 1854. The provisions of the Howell Code are wholly inconsistent with the doctrine of riparian rights. *Stowell* v. *Johnson*, 26 Pac. Rep. 290; *Clough* v. *Wing*, 17 Pac. Rep. 453; *Willey* v. *Decker*, 73 Pac. Rep. 211; *Boquillas Land & Cattle Co.* v. *Curtis et al.*, 89 Pac. Rep. 504.

Even if the common law doctrine of riparian rights ever did obtain in Arizona, it was abrogated by the act of the legislature of March 10, 1887, Rev. Stat. Arizona, 1887, § 3198, which reads as follows:

"The common law doctrine of riparian water rights shall not obtain or be of any force or effect in this Territory." See *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 703.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the appellant to prevent the defendants from withdrawing water from the San Pedro River and from building for that purpose a dam and ditch upon and through the plaintiff's land. The plaintiff owns a tract extending on both sides of the river for about fourteen and one-half miles and reaching back from the river for a mile and one-eighth on each side. It derives its title from a grant of the State of Sonora in 1833, confirmed by a decree of the Court of Private Land Claims on February 14, 1899, and a patent from the United States in pursuance of the decree, dated December 14, 1900. By reason of disputes before the date of the patent and wrongful disputes since, the plaintiff has not made actual use of all the waters of the river, although they are not sufficient to irrigate all the plaintiff's land that admits of irrigation. It has constructed no dams, canals or the like, and has not taken the water except for watering stock and other similar uses of

it in its natural flow. The defendants threaten and intend to build a dam, as alleged, in place of one built in 1903, but washed out, and to build and rebuild a ditch through land of the plaintiff to another ditch already established, and to divert the water through the same to land of theirs on the north. They set up no title except that they have been the first to appropriate the water. The plaintiff claims as riparian owner, and argues that as such it has a right that cannot be taken from it by simple appropriation. The territorial court of first instance and the Supreme Court dismissed the bill, 89 Pac. Rep. 504, and the plaintiff appealed to this court.

It is not denied that what is called the common law doctrine of riparian water rights does not obtain in Arizona at the present day, Rev. Stats. Arizona, 1887, § 3198, but the plaintiff contends that it had acquired such rights before that statutory declaration, and that it cannot be deprived of them now. So far as the claim is rested on the original grant and the Mexican law it may be disposed of in a few words, without going into all the questions that would have to be answered before an opposite conclusion could be reached. "Whatever may have been the general law throughout the Republic of Mexico on the subject of water, it is reasonably certain that in the State of Sonora the doctrine of appropriation, as now recognized, was to some extent in force by custom. In this Territory irrigation was practiced in the Santa Cruz Valley prior to the cession and it is well known the right of appropriation without regard to the riparian character of the lands was there in force probably from the time when the Spaniards first settled in the valley. Our statutes, as well as those of New Mexico, seem to have had their origin in the Mexican law as modified by custom." This is the statement of the territorial court, and we know nothing to control it. It is not met by arguments as to the general character of Mexican law, or by inference from the situation and nature of the grant. The same doctrine seems to be implied by the Howell Code, ch. 55, § 25, which we shall refer to again.

The plaintiff draws another argument from the effect of the United States patent. It contends that the patent not only confirms the Mexican title but releases that of the United States, *Beard* v. *Federy*, 3 Wall. 478, 491, and that by the grant from the United States it gained rights as a riparian proprietor that could not be displaced by a subsequent attempt to appropriate the water. *Sturr* v. *Beck*, 133 U. S. 541. But while it is true that in *Beard* v. *Federy, sup.*, Mr. Justice Field calls such a patent a quit-claim, we think it rather should be described as a confirmation in a strict sense. "Confirmation is the approbation or assent to an estate already created, which, as far as is in the confirmer's power makes it good and valid: so that the confirmation doth not regularly create an estate; but yet such words may be mingled in the confirmation, as may create and enlarge an estate; but that is by force of such words that are foreign to the business of confirmation." Gilbert, Tenures, 75. It is not to be understood that when the United States executes a document on the footing of an earlier grant by a former sovereign it intends or purports to enlarge the grant. The statute under which the Mexican title was decided to be good speaks of confirmation throughout, and, in the most pertinent passage, directing a patent to be issued, says that it shall be issued "to the confirmee." Act of March 3, 1891, c. 539, § 10, 26 Stat. 854, 859. It would be possible, perhaps, to argue to the contrary from provisions in §§ 8 and 13, that the confirmation shall only work a release of title by the United States, but we are satisfied that the true intent of the statute and the reason of the thing are as we have said.

The opinion that we have expressed makes it unnecessary to decide whether lands in the arid regions patented after the act of March 3, 1877, c. 107, 19 Stat. 377, are not accepted subject to the rule that priority of appropriation gives priority of right by virtue of that act construed with Rev. Stat., § 2339. The Supreme Court of Oregon has rendered a decision to that effect on plausible grounds. *Hough* v. *Porter*, 98 Pac. Rep. 1083. See further, act of March 3, 1891, c. 561, § 18, 26 Stat.

1101. *United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 704–706; *Gutierres* v. *Albuquerque Land and Irrigation Co.*, 188 U. S. 545, 553. So it is unnecessary to consider how far, if at all, the defendants represent an appropriation of the water before the patent was granted. For that reason we have not set forth the details found by the court below as to the dams, ditches and use of water, going back to 1877.

But, perhaps, the main contention of the plaintiff is based on the legislation of the Territory, and especially on the Howell Code of 1864, c. 61, § 7, as follows: "The common law of England, so far as it is not repugnant to, or inconsistent with the Constitution and laws of the United States, or the bill of rights or laws of this Territory, is hereby adopted, and shall be the rule of decision in all the courts of this Territory." We assume that this section, however it may affect the case at bar, was within the power of the legislature to enact. *United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 702, 703; *Gutierres* v. *Albuquerque Land and Irrigation Co.*, 188 U. S. 545, 553. Act of June 17, 1902, c. 1093, § 8. 32 Stat. 388, 390. But we agree with the territorial court that, construed with the rest of the code, it is far from meaning that patentees of a ranch on the San Pedro are to have the same rights as owners of an estate on the Thames.

In the first place, this is merely the adoption of a general system as against another general system (the Spanish Mexican), that had been in force and that was repealed by § 1. If there were nothing more in the code, it would be going a great way to say that such a broad phrase forbade the courts to hold that the common law was adaptible and established the English rule of riparian rights only for English conditions, as suggested by Nave, J., below. It might be argued, with force, that an amendment, inserting the words "So far only as is consistent with and adapted to the natural and physical condition of the Territory, and the necessities of the people thereof," merely expressed what was implied before. Rev. Stats. 1887, § 2935. And the like might be urged with regard to § 3198 of the Re-

vised Statutes of 1887, which, in terms, enacted or declared that "the common law doctrine of riparian water rights" should not obtain. But we are not left to rely upon reasonable implications and argument, for other parts of the original code are express upon the point. Therefore we need not consider whether, in any event, the statute could be supposed to confer property rights not previously possessed and not subject to legislative change. Compare *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379, 387, and *Damon* v. *Hawaii*, 194 U. S. 154, 160.

By the statutory bill of rights, Art. 22, all streams capable of being used for the purposes of irrigation are declared to be public property, and no one shall have the right to appropriate them exclusively, except under such equitable regulations as the legislature shall provide. And then chapter 55 "Of Acequias or Irrigating Canals," after again declaring streams of running water public, § 1, enacts that "All the inhabitants of this Territory who own or possess arable and irrigable lands, shall have the right to construct public or private acequias, and obtain the necessary water for the same from any convenient river, creek or stream of running water." § 3. By § 4, when such acequias run through the lands of private persons not benefited, the damages are to be assessed by the probate judge in a summary manner, on application of the party interested. § 4. Preference is given to irrigation over other uses. § 5. By § 7 the exclusive right to the water is given to the persons taking out a ditch for agricultural purposes, and a right to damages if the water afterwards is taken for mining. By § 17 precedence is given in time of scarcity to the oldest titles, and by § 25 "The regulation of acequias, which have been worked according to the laws and customs of Sonora and the usages of the people of Arizona, shall remain as they were made and used up to this day," and the chapter is to be enforced from the day of publication. There are many more details, but we have recited enough to show that the interpretation given by the court below to the general adoption of the common law by the Howell Code, and

the qualifications imposed upon it, were correct. They simply follow what has been understood to be the law for many years. *Clough* v. *Wing*, 2 Arizona, 371.

The right to use water is not confined to riparian proprietors. *Gutierres* v. *Albuquerque Land and Irrigation Co.*, 188 U. S. 545, 556; *Coffin* v. *Left Hand Ditch Co.*, 6 Colorado, 443, 449, 450; *Willey* v. *Decker*, 73 Pac. Rep. 210, 220. Such a limitation would substitute accident for a rule based upon economic considerations, and an effort, adequate or not, to get the greatest use from all available land. Whether there are any limits of distance is a question not arising in this case.

A final objection urged is that the plaintiff's land is taken without compensation. It would seem that this is merely technical in this case. There does not appear to have been any discussion of the point below, and it is probable that the water is the only thing that has substantial value or really is cared for. But the plaintiff is authorized to have his damages assessed if he desires by ch. 55, § 4 (now Rev. Stat., § 3202), as we have mentioned. We think that it would be unjust to disturb the decree on this ground, although in other circumstances the objection might be grave.

Decree affirmed.